[redacted]

SUPREME COURT OF THE [redacted]

[redacted]

No. 198.

THE FIRST NATIONAL BANK OF CHICAGO [redacted]
PLAINTIFF,

vs.

THE CHICAGO TITLE AND TRUST COMPANY

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(19,130.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 139.

THE FIRST NATIONAL BANK OF CHICAGO ET AL., PETITIONERS,

vs.

THE CHICAGO TITLE AND TRUST COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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1 Pleas had at a regular Term of the District Court of the United States for the Northern Division of the Northern District of Illinois begun and held at the United States Court Rooms in the City of Chicago in said Division of said District on the Third Monday of December (it being the Seventeenth day thereof) in the year of our Lord One Thousand Nine hundred, and of the Independence of the United States of America the One hundred twenty-fifth year.

Present the Honorable Christian C. Kohlsaat, Judge of said Court, presiding, John C. Ames, United States Marshal for said District, and T. C. Mac Millan, Clerk of said Court.

2 Be it remembered that heretofore, to wit: on the 8th day of May, A. D. 1901, the following order was had and entered of record in said Court before the Hon. Christian C. Kohlsaat, Judge, to wit:

In re
5810 Alexander Rodgers
Bankrupt

On reading and consideration of the petition of Alexander Rodgers for the appointment of a receiver herein, the court finds that it is absolutely necessary for the preservation of said estate that a receiver be appointed to take charge of and conserve the property of said estate, and it is therefore

Ordered that Chicago Title and Trust Company be and hereby is appointed receiver of the property, and estate of said bankrupt, upon filing a bond herein in the penal sum of Fifty Thousand dollars, conditioned for the faithful performance of its duties as such receiver.

3 And afterwards, to wit: on the 8th day of May A. D. 1901 there was filed in the Clerk's office in the above entitled cause a receiver's bond in the words and figures following, to wit:

4 Know all men by these presents, That Chicago Title and Trust Company, a corporation duly organized under the laws of the State of Illinois, of Chicago, Cook County, Illinois, as principal, and David B. Lyman of Chicago, Cook County, Illinois, and Wm. C. Niblock of Chicago, Cook County, Illinois, as sureties, are held and firmly bound unto the United States of America, in the sum of Fifty Thousand Dollars, in lawful money of the United States, to be paid to the said United States, for which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally by these presents.

Signed and sealed this 8th day of May, 1901

The condition of this obligation is such that whereas the above named Chicago Title and Trust Company was on the 8th day of May, 1901 appointed Receiver in the case pending in bankruptcy known as File No. 5810 in the District Court of the United States for the Northern District of Illinois, wherein Alexander Rodgers is the bankrupt, and it, the said Chicago Title and Trust Company, has accepted said trust with all the duties and obligations pertaining thereto.

Now, therefore, If the said Chicago Title and Trust Company, Receiver as aforesaid, shall obey such orders as said court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets and effects of the estate of said bankrupt which shall come into its hands and possession, and shall in all respects faithfully perform all its official duties as said Receiver then this obligation to be void; otherwise to remain in full force and virtue.

CHICAGO TITLE AND TRUST COMPANY,
By WM. C. NIBLOCK
Vice President.

Attest:
CHESTER C. BROOMELL
[SEAL] *Secretary.*

DAVID B. LYMAN [SEAL]
WM C. NIBLOCK [SEAL]

Signed and sealed in the presence of
JOHN A. LINDEN
L. C. LAZEAR
Approved May 8. 1901
KOHLSAAT. *J.*

Endorsed: 5810. U. S. D. Court. In re Alex Rodgers. Bond
Filed May 8. 1901. at 10 o'clock a. m. T. C. MacMillan. Clerk

5 And afterwards, to wit: on the 10th day of May, A. D. 1901 the following order was had and entered of record in said cause, before the Hon. Christian C. Kohlsaat, Judge, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois.

Present, the Hon. Christian C. Kohlsaat, Judge.

In the Matter of
5810 Alexander Rodgers, Bankrupt } In Bankruptcy

At Chicago, in said District, on the Tenth day of May, A. D. 1901, before the Honorable Christian C. Kohlsaat, Judge of said Court in Bankruptcy, the petition of Alexander Rodgers that he be adjudged a Bankrupt within the true intent and meaning of the

Acts of Congress relating to Bankruptcy, having been heard and duly considered, the said Alexander Rodgers is hereby declared and adjudged Bankrupt accordingly.

6 And afterwards, to wit: on the 10th day of May, A. D. 1901 the following order was had and entered of record in said cause, before the Hon. Christian C. Kohlsaat, Judge, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois.

Present, the Hon. Christian C. Kohlsaat, Judge.

In the Matter of
5810 Alexander Rodgers } In Bankruptcy.
Bankrupt }

Whereas, Alexander Rodgers of Chicago, Ill. in the County of Cook and District aforesaid, on the Tenth day of May, A. D. 1901, was duly adjudged a Bankrupt upon a petition filed in this Court by him on the Eighth day of May, A. D. 1901 according to the provisions of the Acts of Congress relating to Bankruptcy.

It is thereupon ordered that said matter be referred to Sidney C. Eastman, Esq. one of the Referees in Bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Alexander Rodgers shall attend before said Referee on the Eleventh day of May, 1901, at Chicago and thenceforth shall submit to such orders as may be made by said Referee or by this Court relating to said voluntary Bankruptcy.

7 And afterwards, to wit: on the 13th day of May, A. D. 1901, there was filed in said cause the petition of the receiver, said petition being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois.

Northern Division.

In the matter of
Alexander Rodgers
Bankrupt. } In Bankruptcy No. 5810.

To the Honorable Christian C. Kohlsaat Judge of said Court.

Your petitioner' the Chicago Title & Trust Company, the temporary receiver heretofore appointed by the Court in this cause, respectfully shows to the Court that your petitioner as such receiver has taken possession of the property and assets of the said bankrupt, all of which is situate at the premises 220 to 230 Johnson street in the City of Chicago, Cook County, Illinois, except about 475 bags of timothy seed which is in the Chicago Dock Company Warehouse and the Sibley Storage Warehouse in said city, and your petitioner has beeen engaged in and has now about completed an inventory of the said property; that upwards of $30,000.00 of said estate consists of seed, in substantially the following quantities: timothy and clover seed 4539 bags; millet and hungarian 1081 bags; red top 322 bags; buckwheat 584 bags, and a limited quantity of barley, rape, peas, blue grass, and some other kinds of grain but of comparatively small quantities, the season for the sale of which is now on or drawing to a close; and your petitioner further and more particularly shows that there is a present active market for timothy and clover for fall sowing, which activity will be practically ended in the course of the next two or three weeks and that there will then be no active market until in the coming winter for the spring sowing season, except a few days in July for fall sowing; that the market for the sale of red top is nearly over for this season, and that now for a very few weeks is the season for selling and disposing of Hungarian Buckwheat and Millet so that the present time is the season or nearly the closing of the season for selling, marketing and disposing of substantially all of the said stock of seed and grain belonging to the said estate, and that it is and will be to the great interest and advantage of the said estate and of the creditors thereof to have the said stock sold immediately and that as speedy a sale as possible within a couple of weeks for the most of said stock and within a week or ten days thereafter for the remainder thereof is absolutely necessary to prevent great loss and depreciation in the value of said stock of seed and grain and to save the great expense and loss that would result from selling the same

out of season or carrying it over to another season; and as showing the attitude and view of the creditors of the said estate as regards the necessity of a speedy sale of said stock of seed, your petitioner shows that on the afternoon of May 10th instant a meeting of the following creditors of the said estate, called by your petitioner at the request of some of said creditors, was held at room 604 Title & Trust Building, in said city, namely:

F. E. Winans J. A. Patten Mix Transfer Co. Gerstenberg & Co. Eschenberg & Dalton Milo S. Haskall First National Bank of Chicago H. W. Rodgers & Bro. J. F. Harris E. Sickel & Co. Milmine, Dodman & Co. J. C. Vaughan Baldwin & Stone and E. W. Bailey, many of which creditors were personally present and also were represented by their attorneys at said meeting, and at said meeting the matter of said bankrupt's estate was considered by said creditors and it was the consensus of opinion of said creditors that the said stock of seed and grain should be sold speedily and for the reasons your petitioner has above in this petition set forth, and without formal action taken it was agreed that your petitioner should prepare and present to this court a petition for leave and authority to your petitioner as such receiver to sell the said stock immediately in the open markets and through the usual channels of trade, and that such petition be presented to this Court at 10 o'clock Saturday morning May 11th instant and that the said creditors who attended said meeting would consider themselves as notified at such meeting of the presentation of such petition to this court at said time on said May 11th without the service of further notice and your petitioner shows that the said creditors who are herein above named as attending said meeting have claims against the said estate aggregating about $59,500.00 in amount, the same being over nine tenths of the entire indebtedness of said bankrupt, as appears from the schedules filed herein by said bankrupt and as your petitioner is informed and believes.

Your petitioner therefore prays the authority and direction of the court in the premises, and that if an order be entered for the sale of said stock of seed and there are any liens or claims of priority upon or with respect to any of said stock such lien be transferred to the funds arising out of the sale of the property by the proper order of the court.

And your petitioner will ever pray, etc.

CHICAGO TITLE AND TRUST COMPANY
Receiver
By D. B. LYMAN
Pres.

NEWTON WYETH
Attorney

State of Illinois }
County of Cook } ss.

David B. Lyman being first duly sworn on his oath says that he is president of the above named receiver, the Chicago Title and Trust Company, and that he has read the foregoing petition, signed by said receiver, and knows the contents thereof and that the same is true in substance and in fact.

DAVID B. LYMAN

Subscribed and sworn to before me this 11th day of May, A. D. 1901.

[SEAL] HENRY J. TAUSLEY.

Endorsed: 5810 U. S. District Court In re Bankruptcy of Alexander Rodgers Bankrupt Petition of receiver to sell Filed May 13 1901 at 10 o'clock A. M. T. C. MacMillan Clerk Newton Wyeth 1319 Chamber Com Atty for receiver.

9 And afterwards, to wit: on the 16th day of May, A. D. 1901, there was filed in said cause the answer of Frank E. Winans, said answer being in words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES

for the Northern District of Illinois.

In the matter of
Alexander Rodgers } 5810
Bankrupt

Answer of Frank E. Winans to petition of Chicago Title and Trust Company, receiver.

Now comes Frank E. Winans, by Gregory, Poppenhusen & McNab, his attorneys, and for an answer to the petition of Chicago Title & Trust Company, receiver herein, answering says:

This respondent admits the appointment of Chicago Title & Trust Company as set forth in said petition, and admits that as such receiver it took possession of the assets of said bankrupt.

This respondent further admits that all of the assets in the premises 220-230 Johnson Street that came into the possession of the receiver were the assets of the bankrupt, with this exception; that

there were and still is in said premises 233 bags of timothy seed which are the property of this respondent. That said 233 bags of timothy seed as aforesaid were taken possession of by the receiver.

This respondent further answering admits that he was present at the meeting of creditors as set forth in said petition and that he consented to an immediate sale of all of said property, but with this qualification, that by said sale his rights to the 233 bags of timothy seed, as aforesaid, should attach to the funds derived from the sale of the said 233 bags of timothy seed.

FRANK E. WINANS

JOSEPH L. MCNAB

Endorsed: 5810 In the District Court of the United States In re Alex Rodgers Bankrupt Answer of Frank E. Winans Filed May 16 1901 at 3 35 o'clock P. M. T. C. MacMillan Clerk. Gregory, Poppenhusen & McNab.

10 And afterwards, to wit: on the 16th day of May A. D. 1901 there was filed in the Clerk's office the special appearance of the First National Bank, in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois.

In the matter of Alexander Rodgers, A Bankrupt. } No. 5810.

The First National Bank of Chicago Appears herein for the sole purpose of denying the jurisdiction of this court to enter an order as prayed in and by the petition of the Chicago Title and Trust Company, the temporary Receiver herein, filed herein May 13, A. D. 1901, or any order interfering with the control by this respondent of the property hereinafter described; and this respondent not waiving its objection to the jurisdiction of the court as aforesaid and for the sole purpose of supporting its said objection, shows to the court that it holds in pledge to secure indebtedness owing to it by the bankrupt, warehouse receipts issued by the National Storage Company to said bankrupt as follows:

Receipt No.	Lot No.	Date.	Property.
9426	60	May 1, 1901,	244 bags Hungarian seed contained in Division E., Section 9, second floor of the warehouse premises No. 281 of said *National Storage Co.*, at No. 220-230 Johnson Street, Chicago, Ills.
9427	61	May 1, 1901,	80 bags clover seed contained in Division B., Section 8, fifth floor of warehouse premises aforesaid.
9348	58	Mch. 29, 1901,	70 bags alsike seed contained in Division B., Section 12, fifth floor of warehouse premises aforesaid.
9246	55	Feb. 27, 1901,	322 bags timothy seed contained in Division F, Section 6, basement of warehouse premises aforesaid.
11 9425	59,	May 1, 1901,	250 bags Hungarian seed, contained in Division B, Section 10, third floor of warehouse premises aforesaid.
9195	47	Jan. 19, 1901,	351 bags buckwheat contained in Division B., Section 25, fifth floor of warehouse premises aforesaid.
9244	54	Feb. 23, 1901,	250 bags timothy seed contained in Division F., Section 4, basement of warehouse premises aforesaid.

Receipt No.	Lot No.	Date.	Property.
9118	40	Dec. 24, 1900,	247 bags timothy seed contained in division D., Section 7, third floor of warehouse premises aforesaid.
8408	8	Aug. 31, 1900,	250 bags timothy seed contained in Division D., Section 8, third floor of the warehouse premises aforesaid.
8489	25	Oct. 22, 1900,	250 bags timothy seed, contained in Division D., Section 1, third floor of the warehouse premises aforesaid.
8928	33	Nov. 15, 1900,	250 bags timothy seed contained in Division D., Section 3, third floor of warehouse premises aforesaid.
8406	6	Aug. 31, 1900,	225 bags timothy seed contained in Division D., Section 6, third floor of warehouse premises aforesaid.
8437	20	Sept. 10, 1900,	250 bags timothy seed contained in Division B., Section 3, fifth floor of warehouse premises aforesaid.

Said warehouse receipts were all duly endorsed by the bankrupt and delivered and pledged to this respondent as aforesaid for moneys in good faith loaned and advanced to said bankrupt at the times respectively of the pledging of said receipts as aforesaid.

This respondent further says that all of the seed described in and covered by the warehouse receipts aforesaid is included, as this respondent is informed and believes, as a part of that which the tem-

porary Receiver herein claims in and by its petition aforesaid to have in its possession, but that as a matter of fact the said seed covered and represented by the warehouse receipts aforesaid is not and never has been in the possession of the said temporary Receiver, and was not at the time of the bankruptcy or at any time since the issuing of the warehouse receipts therefor respectively as aforesaid in the possession of the said bankrupt. On the contrary the said seed represented and covered by the warehouse receipts aforesaid was and has been at all times since the issuing of the warehouse receipts therefor respectively as aforesaid in the full possession and control of the said National Storage Company.

This respondent further shows to the court in support of its objection to the jurisdiction of the court as aforesaid, that although a representative of this respondent did attend the meeting mentioned in the said petition of the temporary Receiver as held on the afternoon of May 10th instant, this respondent by its said representative or otherwise did not concur in the proceedings of said meeting or in anything said or done thereat except to the extent of agreeing that the seed in question ought to be promptly sold in order not to lose a favorable market therefor, and this respondent therefore denies all the averments of said petition to the effect that this respondent agreed to the filing of the petition aforesaid either with or without notice to this respondent. And this respondent denies also that it waived notice of the filing of said petition or of any other proceeding which might be taken by the temporary Receiver or other parties involved, and on the contrary avers that it insisted that it would accept no notice and consent to no application to this court until what was proposed was put in writing and submitted, which was never done until the petition aforesaid was filed.

For the reason aforesaid this respondent denies the jurisdiction of the court herein and prays that said petition may on that account be dismissed, so far as the seed represented and covered by the warehouse receipts aforesaid held in pledge by this respondent is concerned.

THE FIRST NATIONAL BANK OF CHICAGO
By JAS B. FORGAN
Pres

Dated, Chicago, Ills., May 15, 1901.

13 State of Illinois }
County of Cook. } ss.

James B. Fogan, Being duly sworn, says, that he is the President of The First National Bank of Chicago and its duly authorized agent in this behalf; that he has read the foregoing answer signed by said bank and knows the contents thereof, and that the same is true of his own knowledge except as to the matters and things which are therein stated to be upon information and belief, and that as to those matters he believes it to be true.

JAS. P. FOGAN

Subscribed and sworn to before me this 15th day of May A. D. 1901.

JAMES D. WOLEY,
[SEAL] *Notary Public.*

Endorsed: 5810 U. S. District Court of Cook County Alex Rodgers Bankrupt Special Appearance of First Nat. Bank of Chicago. Filed May 16 1901 at 4 40 o'clock P. M. T. C. MacMillan, Clerk. Orville Peckham

14 And afterwards, to wit: on the 16th day of May, A. D. 1901 there was filed in said cause the answer of H. W. Rogers & Brother to the petition of the receiver, said answer being in the words and figures following, to wit:

15 United States of America }
Northern District of Illinois } ss.

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois.

In the matter of
Alexander Rodgers, } In Bankruptcy. No. 5810
a bankrupt

Henry W. Rogers and James C. Rogers, partners doing business as H. W. Rogers & Brother, who appear specially and only for the purpose of objecting to the jurisdiction of this honorable court to grant the prayer of the petition of the Chicago Title and Trust Company, temporary receiver filed herein on the 13th day

of May instant so far as the same relates to the personal property hereinafter specifically described and set forth and who are named as defendants to said petition, protest and object that this honorable court hath not obtained jurisdiction to pass upon the rights and claims of these respondents in and to the said personal property and without waiving said question of jurisdiction but for the purpose of stating and setting forth their objection thereto, for answer to said petition or to so much and such parts thereof as these respondents are advised it is material or necessary for them to make answer unto, answering say:

That they admit the appointment of said temporary receiver but they deny that the said receiver is in possession of the personal property hereinafter described and they deny that the said bankrupt was in possession of the same or any part thereof at the time of the filing of the petition in bankruptcy herein.

16 These respondents further answering state and show that on the 20th day of February 1901 they made a loan to the said Alexander Rodgers of five thousand dollars ($5000) and as evidence of said loan took from the said Rodgers his promissory note of that date in and by which he promised to pay on demand to these respondents by the name of H. W. Rogers & Bro. five thousand dollars ($5000) at their office with interest at the rate of five per cent per annum, which note was signed by the said Rodgers and delivered to these respondents and it has ever since been in their possession and they are the legal holders and owners thereof and the whole thereof is unpaid; a copy of which said note is hereto attached marked Exhibit "A" and prayed to be taken as a part hereof.

These respondents further answering state and show that to secure the payment of said sum the said Rodgers agreed to deliver to and deposit with these respondents warehouse receipts for seed, which receipts should aggregate and be of the value of about six thousand dollars ($6000) and that as a matter of fact at the time of the delivery of said note the said Rodgers put in the hands of these respondents certain warehouse receipts for seed and that at the request of said Rodgers these respondents have allowed him to change the said receipts as he had purchasers for the seed that was covered by certain warehouse receipts which were originally deposited and that in all cases when a warehouse receipt was surrendered, another warehouse receipt of a similar character was delivered to these respondents and that prior to the time of the petition in bankruptcy being filed herein these respondents held as security

for said note the following warehouse receipts issued by the National Storage Company as follows:—

Warehouse receipt number 9154 for 250 bags timothy seed said to weigh 30549 pounds, lot number 43 contained in division
17 B, section 4, fifth floor at its warehouse premises number 281 located at number 220 to 230 Johnson street, Chicago, Illinois, dated January 5, 1901.

Also warehouse receipt number 9155 for 250 bags timothy seed, said to weigh 30421 pounds, lot number 44 contained in division B, section 5, fifth floor in the same warehouse, dated January 5, 1901.

Also number 9224 for 250 bags timothy seed, said to weigh 31892 pounds, lot number 50 contained in division B, section 30, fifth floor, same warehouse, dated February 19, 1901.

Also number 9227 for 250 bags red top seed, said to weigh 24969 pounds, lot number 53 contained in division B, section 7, fifth floor, same warehouse, dated February 19, 1901.

Also number 9436 for 221 bags buckwheat seed, said to weigh 26815 pounds, lot number 62 contained in division B, section 19, fifth floor, same warehouse, dated May 7, 1901.

That all said warehouse receipts were issued to the said Alexander Rogers and by him duly endorsed and delivered to these respondents before any proceedings were taken; all of which will more surely appear from the said warehouse receipts ready to be produced as this honorable court shall direct.

These respondents further answering say and aver on information and belief that at the time of the issuing of said several warehouse receipts the several lots of seed represented thereby were in the actual physical possession of the said National Storage Company and that the said property continued in the possession of said company in premises leased and controlled by said company at the time of the filing of the petition in bankruptcy herein and to the present time and they deny that the said seed or any part thereof was ever in the possession of said bankrupt after said receipts were issued and delivered as aforesaid and they deny that the said seed
or any part thereof is now in the possession of the said tem-
18 porary receiver and they deny that the said receiver has the right to take possession of the said seed or to sell the same and they respectfully deny that this court has any jurisdiction or authority to adjudicate and pass upon the rights and claims of these respondents to said seed.

These respondents further answering say that the said warehouse receipts so as aforesaid endorsed and delivered to these respondents

were delivered to them at or about their dates respectively as security for said loan of money. That the said receipts are negotiable and are evidence of the ownership of the said seed in these respondents and they aver that they are entitled in the law to retain said receipts and to sell the seed represented thereby without any interference from the said receiver and to apply the proceeds or avails of said sales to the payment of said indebtedness being accountable only to the said receiver or to the trustee in bankruptcy to be hereafter appointed herein for the surplus or equity over and above the indebtedness held by respondents.

These respondents further answering say that it is true they attended a meeting of creditors of said bankrupt on or about the 10th day of May instant but that it is not true that they at any time or in any manner consented that the receiver might sell the said property herein specifically described either with or without a petition or at public or private sale and that it is not true that they ever consented that this court might or should authorize the receiver to take possession of the said property so pledged to and held by these respondents and sell the same or any part thereof. And these respondents deny that the petitioner is entitled to the relief prayed for in his petition as to the seed herein specifically described or to any relief touching the same.

And now having fully answered they pray to be hence dismissed with their reasonable costs and charges and that this honorable
19 court will adjudge and decree that it has no jurisdiction to proceed further in this summary manner in this behalf.

HENRY W. ROGERS
JAMES C. ROGERS

State of Illinois }
County of Cook } ss.

James C. Rogers being first duly sworn, on oath states that he has read the foregoing answer by him subscribed and knows the contents thereof and that the same is true of deponent's own knowledge except as to the matters and things which are therein stated to be upon information and belief and that as to those matters he believes it to be true.

JAMES C. ROGERS

Subscribed and sworn to before me this 16th day of May A. D. 1901.

OSCAR E. FLINT
Notary Public.

[SEAL]

EXHIBIT "A".

$5000 Chicago Feby 20, 1901.

On demand after date I promise to pay to the order of H. W. Rogers & Bro. five thousand dollars at their office, value received with interest at the rate of five per cent per annum.

ALEX RODGERS

{ Revenue stamp $1 cancelled. }

KERR AND KERR
Attys

20 (Endorsed) In Bankruptcy No. 5810 In the District Court of the United States Northern District of Ill In the matter of Alexander Rodgers, a bankrupt. Answer to petition of temporary receiver. Filed May 16 1901 at 9-55 o'clock A. M. T. C. MacMillan, Clerk. Kerr & Kerr, Attorneys 189 La Salle St.

21 And afterwards, to wit: on the 16th day of May A. D. 1901 there was filed in said cause the answer of the National Storage Company to the petition of the receiver, said answer being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois.

In the Matter of Alexander Rodgers, Bankrupt. } In Bankruptcy, No. 5810.

In the Matter of the Petition by the Receiver in said cause, the Chicago Title & Trust Co., filed in said cause on the.....day of May, 1901, asking for the entry of an order authorizing and directing said Receiver to sell a certain stock of seed set forth and described in said Petition.

And now comes the National Storage Company, by Heckman, Elsdon & Shaw, its attorneys, and enters its qualified and limited appearance in this case, for the sole and exclusive purpose of denying the jurisdiction of the court in the matter of said petition, and over the said National Storage Company.

The said National Storage Company here now says and alleges that this court has no jurisdiction in or over the matters and things contained in said petition so far as the same and the order prayed for includes and relates to property hereinafter mentioned in the possession and control of the said National Storage Company, as hereinafter stated, and objects to the assumption or exercise by the court of any jurisdiction over the matters set forth in said petition in so far as the same includes and relates to property hereinafter mentioned in the possession and control of the said National Storage Company, as hereinafter stated, and objects to the entry of any order on said petition as to the property hereinafter described, on the ground that said court has no jurisdiction over the same or any part thereof, and has no jurisdiction in relation to or over the property hereinafter described.

The said National Storage Company, without submitting itself to the jurisdiction of this Honorable Court, for the pur-
22 poses aforesaid, shows to this Honorable Court, that on or about the 31st day of August, A. D. 1900, the National Storage Company aforesaid entered into an indenture of lease with Alexander Rodgers, who was then the owner of, and in possession of the premises hereinafter described, in and by which said lease the said Alexander Rodgers demised and leased to the said National Storage Company, for a good and sufficient consideration, and in consideration of certain rents reserved in said lease, the following described premises, situated in the City of Chicago, County of Cook, and State of Illinois, to wit: All of the basement and second floor, the north half of the third and fourth floors, and all of the fifth and sixth floors, of the six storey and basement brick building situated at and known as Nos. 220, 222, 224, 226, 228 and 230 Johnson Street, for and during the term and period of three years from and after the said 31st day of August, 1900, the said National Storage Company entered into possesion and occupancy of the premises mentioned and described, under said lease, and has been and continued in such possession from thence hitherto, and that said lease is still in full force and effect.

And the said National Storage Company, for the purposes aforesaid, further denies that said Receiver has at any time taken possession of said premises mentioned in said lease or any part thereof, and denies that said Receiver has taken possession of the property or any part thereof hereinafter described situated in said premises described in said lease, and denies the right of said Receiver so to do; and further, for the purposes aforesaid, shows to this Honorable Court that at and prior to the time of the filing of the petition

tion- Co. 6. in bankruptcy in the above entitled cause the said National Storage Company had possession of, and had stored in said premises,
23 the following goods and property, for which it had issued its warehouse receipts, viz:

In the basement of said premises the following goods and property:

250 bags of Timothy Seed in Section 4 of Division "F", for which it had issued its warehouse receipt No. 9244.

322 bags of Timothy Seed, in Section 6 of Division "F", for which it had issued its warehouse receipt No. 9246.

Upon the second floor of said premises the following goods and property:

250 bags of Timothy Seed, in Section 8 of Division "E", for which it had issued its warehouse receipt No. 9067.

250 bags of Timothy Seed in Section 5 of Division "E", for which it had issued its warehouse receipt No. 9086.

244 bags of Hungarian Seed, in Section 9 of Division "E", for which it had issued its warehouse receipt No. 9426.

250 bags of Timothy Seed, in Section 6 of Division "E", for which it had issued its warehouse receipt No. 9437.

250 bags of Timothy Seed, in Section 4 of Division "E", for which it had issued its warehouse receipt No. 9438.

Upon the third floor of said premises the following goods and property:

225 bags of Timothy Seed, in Section 6 of Division "D", for which it had issued its warehouse receipt No. 8406.

250 bags of Timothy Seed, in Section 8 of Division "D", for which it had issued its warehouse receipt No. 8408.

250 bags of Timothy Seed, in Section 1 of Division "D", for which it had issued its warehouse receipt No. 8489.

250 bags of Timothy Seed, in Section 3 of Division "D", for which it had issued its warehouse receipt No. 8928.

247 bags of Timothy Seed, in Section 7 of Division "D", for which it had issued its warehouse receipt No. 9118.

250 bags of Hungarian Seed, in Section 10 of Division "D", for which it had issued its warehouse receipt No. 9425.

Upon the fifth floor of said premises the following goods and property:

250 bags of Timothy Seed, in Section 5 of Division "B", for which it had issued its warehouse receipt No. 8437.

24 250 bags of Timothy Seed, in Section 4 of Division "B", for which it had issued its warehouse receipt No. 9154.

250 bags of Timothy Seed, in Section 5 of Division "B", for which it had issued its warehouse receipt No. 9155.

351 bags of Buckwheat Seed, in Section 25 of Division "B", for which it had issued its warehouse receipt No. 9195.

250 bags of Timothy Seed, in Section 30 of Division "B", for which it had issued its warehouse receipt No. 9224.

250 bags of Red Top Seed, in Section 7 of Division "B", for which it had issued its warehouse receipt No. 9227.

70 bags of Alsile Seed, in Section 12 of Division "B", for which it had issued its warehouse receipt No. 9348.

80 bags of Clover Seed, in Section 8 of Division "B", for which it had issued its warehouse receipt No. 9427

221 bags of Buckwheat Seed, in Section 19 of Division "B", for which it had issued its warehouse receipt No. 9436.

That in each of said sections a printed notification was placed of the control and possession of said property by the National Storage Company, and that in a conspicuous place upon the front of each of said sections was attached a tag containing the name of the said National Storage Company, giving the number of the warehouse, the date when the goods were stored, the lot number, division number, and the section number of the goods, and the number of bags contained in each pile in each of said sections, together with a printed notification on each of said tags that the said tag and card must not be disturbed or obscured and the whole number of said bags contained in each lot, and that such printed notification and tags have remained continuously, undisturbed and unobscured, on each of said piles in each of said sections where said property was contained on the premises so leased and occupied by the National Storage Co., from thence hitherto.

And the said National Storage Company further shows, for the purposes aforesaid, that it is now in the actual and exclusive possession, by its agents and employees, of the whole of the property hereinbefore described, which said goods and property are located on the said premises so leased and occupied by the said National Storage Company.

And the said National Storage Company further shows, for the purposes aforesaid, to this Honorable Court, that it is, under and by virtue of the statutes of the State of Illinois, and under and by virtue of its organization under the laws of the State of Illinois, a public warehouseman, known and designated under the statutes of the State of Illinois as a warehouseman of Class "C", and that the warehouse receipts of the National Storage Company issued by the said National Storage Company entitle the holders thereof to

the property mentioned and described in said warehouse receipts, upon presentation of the same to the said National Storage Company, and that under and by virtue of the laws of the State of Illinois the said National Storage Company is charged with certain public duties and responsibilities, among which is the duty of delivering to the holders of said warehouse receipts, on demand, the property mentioned therein, in accordance with the terms and conditions thereof; and that said National Storage Company and its officers, by reason of the fact that said National Storage Company is under the laws of the State of Illinois a public warehouseman of Class "C", are liable to certain sundry severe penalties in the event of their violation of their duties as public warehousemen, and that a failure to deliver on demand to the holder or holders of the said warehouse receipts the property therein described upon presentation thereof, and compliance with the conditions thereof, would subject the said National Storage Company and its officers to the penalties prescribed in and by the laws of the State
26 of Illinois for such breach of their duty as public warehousemen.

That the said National Storage Company and other storage companies doing business in the city of Chicago and elsewhere in like manner, have been and are in the habit of issuing warehouse receipts for property so in their possession as aforesaid, amounting to many millions of daollars, and that any attempt on the part of the Receiver in this cause to take from the National Storage Company siad property so in its possession, as aforesaid, and to sell the same without due course of law, would work an irreparable injury to the National Storage Company, ruinous to its entire business and credit, and subject the officers of the National Storage Company to prosecutions and to the penalties above mentioned.

And the said National Storage Company further shows, for the purposes aforesaid, that said receiver has not in and by his said petition stated such a cause of action as against said National Storage Company as entitles him to the whole or any portion of the relief prayed for in and by his said petition, so far as relates to the goods and property hereinbefore mentioned and described.

NATIONAL STORAGE COMPANY.
by HECKMAN, ELSDEN & SHAW.
its solicitors.

State of Illinois. }
Cook County. }

Walter Tod, Treasurer of the National Storage Company, being first duly sworn, on oath says he has read the foregoing answer signed by the National Storage Company, and that he knows the contents thereof and that the statements therein contained are true.

WALTER TOD.

Subscribed and sworn to before me this sixteenth day of May, 1901.

BURTON THOMS,
Notary Public. [SEAL].

Endorsed: 5810. U. S. District Court, Northern District of Illinois. In re. Alex Rodgers, In Bankruptcy. Answer of National Storage Co. to petition of Chi. Title & Trust Co., Receiver. Filed May 16, 1901 at 4:45 o'clock P. M. T. C. MacMillan, Clerk. Heckman, Elsden & Shaw, Attys.

27 And afterwards, towit: on the 16th day of May, A. D. 1901, there was filed in said cause the answer of James A. Patten et al, said answer being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES

For the First District of Illinois.

In the matter of the petition of } In Bankruptcy
Alexander Rodgers } Gen. No. 5809

And now comes James A. Patten, a creditor to the extent of about Thirty-three Thousand, Seven Hundred Dollars ($33,700), and E. W. Bailey, a creditor to the extent of about Two Hundred and Twelve Dollars ($212), by Joseph E. Paden, their attorney, and for answer to the petition of the receiver herein to sell the goods of said bankrupt, say, that in their judgment it is necessary that the property be sold as quickly as possible in order to obtain a satisfactory price therefor.

These creditors further answering, say, that they have investigated the facts relating to the socalled liens held by the First National Bank of Chicago and by H. W. Rogers & Company, and have also investigated the socalled warehouse receipts issued by

the National Storage Company, and in their judgment no liens have been created by the issuing or the pledging of such receipts, and they deny that the said The First National Bank, H. W. Rogers & Company or the National Storage Company have any lien or priority upon the assets in the hands of the receiver

JOSEPH E. PADEN
Attorney for said creditors.

Endorsed: #5810 In U. S. Court In re Bankruptcy Alexander Rodgers Answer of James A. Patten et al Filed May 16 1901 at 3 35 o'clock P. M. T. C. MacMillan Clerk.
Joseph E Padden for creditors.

28 And afterwards, to wit: on the 17th day of May, A. D. 1901 there was filed in the Clerk's office the petition of F. E. Winans, in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois.

In the Matter of
Alexander Rodgers,
Bankrupt.

To the Honorable Christian C. Kohlsaat, Judge of the District Court of the United States, for the Northern District of Illinois:

Your petitioner, Frank E. Winans, respectfully represents and shows unto the Court:

1st—That your petitioner is engaged in a general grain and commission business in the City of Chicago, Illinois, in said District, and is a member of the Board of Trade in said City of Chicago,

That your petitioner was, on the 26th day of April, 1901, and has ever since and still is engaged in doing general grain and commission business in said City of Chicago;

2nd—That the said Bankrupt, on the 26th day of April, 1901, was a resident of said City of Chicago and was engaged in the business of buying and selling seed, having a warehouse in the City of Chicago and being a member of said Board of Trade, and so continued until May 8th, 1901;

3rd—That on the 26th day of April, 1901, your petitioner sold

the said bankrupt a car load of Timothy Seed, said seed being then in the possession of the Chicago, Burlington & Quincy Ry. Co. and loaded on their car No. 19055 in the said City of Chicago, said railroad holding the same as the agents of your petitioner,

That the said deed was sold, as aforesaid, by your petitioner to said Bankrupt, to be paid in cash to your petitioner by said bankrupt upon the delivery of said seed to said bankrupt. That upon said sale being made, and on or about the 26th day of April, 1901, your petitioner delivered to said bankrupt said seed, and according to usage of the Board of Trade, of which your petitioner
29 and bankrupt are both members, it became the duty of said bankrupt to have the said seed weighed upon receiving the seed, and to immediately notify your petitioner of the weight of the seed, and to immediately thereupon pay to your petitioner the price for which the said seed was sold; and your petitioner alleges that the delivery of said seed to said bankrupt by your petitioner was not to be completed until your petitioner had received from the said bankrupt the notice of the weight, and that, until this was done, your petitioner did not have the right to receive payment for said seed;

4th—Your petitioner is informed and believes it to be true, and therefore further alleges that on the said 26th day of April, 1901, when the seed sale was made, said bankrupt, was insolvent and unable to pay his debts, the amount of his debts being largely in excess of his assets, and that said bankrupt then knew he could not pay your petitioner for the said car of seed, and that when he purchased the same the said bankrupt did not intend to pay your petitioner for said seed, but intended to obtain possession thereof and thus to defraud your petitioner of his just rights in the premises;

5th—That on the 27th day of April said seed came into the possession of the bankrupt, but your petitioner does not know, whether in accordance with the said agreement and usage, said bankrupt had the said seed weighed, but your petitioner alleges and states the fact to be that the said bankrupt did not, as required by said agreement and usage notify your petitioner of the amount of said weight, although frequently requested so to do, and your petitioner therefore alleges that the delivery of said seed to the said bankrupt has never been completed. That the said Bankrupt has not, nor has any other person for him paid to your petitioner the purchase money for said car, and that the said seed has remained since the 26th day of April, 1901, and still does remain, the property of your petitioner;

6th—That on the 8th day of May, 1901, said bankrupt filed his petition in this Court, praying to be adjudged a bank-
30 rupt, and on the same day a receiver was appointed by this Court; said Receiver immediately took possession of all the property and assets of said bankrupt, including all the seed in his possession in his warehouse in said City of Chicago; and your petitioner alleges that among the seed so taken possession of by said Receiver is the seed hereinabove mentioned, formerly situated in sar car No. 19055; that on the 9th day of May, 1901, your petitioner made a demand on the Receiver herein to deliver to your petitioner the said seed, and thereby recinded the said contract for the sale of the said seed, but that the said Receiver refused to deliver possession of the said seed to your petitioner;

That your petitioner has recinded and does again recind on account of the facts hereinabove stated, the said contract for the sale of said seed.

7th—That on the 26th day of April, 1901, your petitioner also sold to the said bankrupt a certain quantity of Timothy Seed, to wit: eleven bags, said seed being in the possession of the Atchison, Topeka and Santa Fe Ry. Co. and loaded in their car No. 1428 in the said City of Chicago, said railroad holding the same as agents of your petitioner;

That said seed was sold as aforesaid by your petitioner to said bankrupt, to be paid in cash upon the delivery of said seed to said bankrupt.

That, upon said sale being made, and on or about the 26th day of April, 1901, your petitioner delivered to said bankrupt said seed, and in accordance with the agreement and usage among the members of the Board of Trade of said City of Chicago, where said sale was made, of which usage the bankrupt had notice, and according to which usage, it became the duty of the said bankrupt to have the said seed weighed upon receiving the same, and to immediately notify your petitioner of the weight of the seed in the said car, and to immediately thereupon pay the price for
31 which said seed was sold; and your peti- alleges that the delivery of said seed to said bankrupt was not to be completed until your petitioner had received from the said bankrupt the notice of the weight of the said seed, and that, until this was done, your petitioner did not have the right to receive payment for said seed.

8th—That some time after the 26th of April, and before the 8th day of May, the exact date being unknown to your petitioner, the said bankrupt obtained possession of the said seed and took the seed, but your petitioner does not know whether, in accord-

ance with the agreement and usage, the said bankrupt had the said seed weighed, but your petitioner alleges and states the fact to be that the said bankrupt dod not, as required by agreement and usage, notify your petitioner of the amount of said weight, although frequently requested so to do, and your petitioner therefore alleges that the delivery of said seed to said bankrupt has never been completed. That the said bankrupt has not, nor has any other person for him paid to your petitioner the purchase money for the said seed, and that the said seed has remianed since the 26th day of April, 1901, and still does remain property of your petitioner.

That on the 9th day of May your petitioner made a demand on the Receiver herein for the said seed, and thereby recinded the said contract, but that said Receiver refused to deliver possession of said seed to your petitioner; that your petitioner has recinded and does again recind on account of the facts hereinabove stated the contract for the sale of the said seed.

Your petitioner therefore prays that an order may be entered by the Court, directing the Chicago Title & Trust Co., as such Receiver, to deliver to your petitioner the said seed and that such other orders as may be made in the premises as to the Court may seem meet:

And your petitioner will ever pray, etc.

FRANK E. WINANS,
By GREGORY, POPPENHUSEN and MCNAB,
Attorneys.

32 GREGORY, POPPENHUSEN & MCNAB.

United States of America
Northern District of Illinois. } ss.

John E. Baker, Agent of Frank E. Winans, being first duly sworn, deposes and says, that he has read the foregoing petition, that he knows the contents thereof, and that the same is true

JOHN E. BAKER.

Subscribed and sworn to before me this 16th day of May, A. D. 1901.

.....
Notary Public.

Endorsed: 5810. In the District Court of the United States. In re. Alex. Rodgers, Bankrupt. Petition of F. E. Winans. Filed May 17, 1901 at 10 o'clock A. M. T. C. MacMillan, Clerk. Law Offices of Gregory, Poppenhusen and McNab, 100 Washington Street, Chicago.

33 And afterwards, to wit: on the 20th day of May, A. D. 1901 there was filed in the Clerk's office in the above entitled cause the answer of James A. Patten et al to the petition of Frank E. Winans, said answer being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois.

In the matter of Bankrupt Alexander Rodgers, } In bankruptcy No. 5810.

And now come James A. Patten and E. W. Bailey & Co. creditors, by Joseph E. Paden, their attorney, and answering the petition filed herein of Frank E. Winans, say:

1. That they are not acquainted with the facts set forth in the said petition as to the sale and delivery of seed by said petitioner to the bankrupt herein, and they demand strict proof thereof.

2. That, assuming all the facts are true as set forth in the said petition, that said petitioner is not entitled to the relief prayed for therein.

3. These creditors further answering, say, that said petitioner is simply a general creditor of Alexander Rodgers, Bankrupt, and is not entitled to any preference in the distribution of the assets of said estate and is not entitled to the return of any goods which he may have heretofore sold to said bankrupt, and that said petitioner is not entitled to the preference or lien claimed in said petition.

JAMES A. PATTEN,
E. W. BAILEY & CO.
By JOSEPH E. PADEN,
their attorney.

(Endorsed) 5810 In U. S. Dist. Ct. In re Alexander Rodgers Bankrupt Answer of Patten et al to petition of Frank E. Weinans Filed May 20 1901 at 2-30 o'clock P. M. T. C. MacMillan Clerk
Joseph E. Paden for creditors.

34 And afterwards, to wit: on the 20th day of May, A. D. 1901 there was filed in said cause the answer of the receiver to the petition of F. E. Winans, said answer being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Northern Division.

In matter of Alexander Rodgers, Bankrupt } In Bankruptcy No. 5810.

Answer of temporary receiver to petition of F. E. Winans, filed herein May 17, 1901:—

The Chicago Title & Trust Company, temporary receiver herein for answer to said petition says on information and belief that the seed therein mentioned was purchased by said bankrupt from said petitioner in the regular course of business, received by him, said bankrupt, at his warehouse, and dumped, cleaned, grated, and mixed witg other seed of said bankrupt, and has so remained indistinguishable from his other seed, and some or all of the same may have been by him sold and disposed of in regular course of business to other purchasers; that at said times said seed was so purchased and received said bankrupt intended to purchase same & to pay for same in regular course of business, and said bankrupt did not hold same as agent of petitioner, and said sale was completed with said delivery, & not to be completed thereafter as alleged in said petition.

Wherefore receiver says said petition should be dismissed and relief therein prayed denied.

CHICAGO TITLE & TRUST COMPANY,
By NEWTON WYETH
Its Attorney.

(Endorsed) 5810 U. S. Dist. Ct. Answer receiver to petition of F. E. Winans Filed May 20 1901 at 9-55 o'clock A. M. T. C. MacMillan Clerk.
Newton Wyeth Atty for Receiver.

34½ And afterwards, towit, on the 20th day of May, A. D. 1901, the following order was had and entered of record in said cause, before the Hon. Christian C. Kohlsaat, Judge, towit:

20. In re
5810 Alexander Rodgers, Bankrupt.

Come the parties by their solicitors and on motion for a hearing on the petitions filed herein praying for an order on the receiver herein to return certain goods to petitioning claimants thereof and the answer of the Chicago Title and Trust Company, receiver herein, thereto, It is

Ordered by the Court that said petitions and answers be and hereby are specially referred to Referee S. C. Eastman, to hear, take proofs and report his conclusions and recommendations thereon to this Court. And it is further

Ordered by the Court that the said Receiver have leave and it is hereby authorized to sell and dispose of in the regular open market for such commodities, at the current market prices from day to day, all of the said stock of seed which is not claimed by any of the said petitioners and the said First National Bank and H. W. Rogers and Brother, and that the Receiver also sell and dispose of the membership of the said Alexander Rodgers, Bankrupt, in the Board of Trade in the City of Chicago, and also that said Receiver close out and dispose of the contracts of sale and of purchase of the said bankrupt, and that the receiver report his doings in the premises to the Court with all convenient speed.

35 And afterwards, to wit: on the 5th day of July, A. D. 1901 there was filed in said cause the order approving the trustee's bond, said order being in the words and figures following, to wit:

ORDER APPROVING TRUSTEE'S BOND.

At a Court of Bankruptcy, held in and for the Northern District of Illinois, at Chicago, Illinois, this 5th day of July A. D. 1901, before Sidney C. Eastman, Referee in Bankruptcy.

In the District Court of the United States.

For the Northern District of Illinois.

In the Matter of Alexander Rodgers Bankrupt. } In Bankruptcy.

It Appearing to the Court, Chicago Title & Trust Co. of Chicago, and in said district, has been duly appointed trustee of the estate

of the above named bankrupt, and has given a bond with sureties for the faithful performance of his official duties, in the amount fixed (1) by the creditors, (2) by the order of the court, to wit, in the sum of Thirty Thousand Dollars, it is ordered that the said bond be, and the same is hereby, approved.

SIDNEY C. EASTMAN
Referee in Bankruptcy.

Erase (1) or (2) in accordance with fact.

(Endorsed) 5810 U.S.D.C. Nor. D. of Ill. In re Alexander Rodgers, Bkpt. Order app Tr's Bond Filed Jul 5 1901 T. C. MacMillan Clerk.

36 And afterwards, to wit: on the 5th day of August, A. D. 1901, there was filed in the Clerk's office in said cause the referee's report on the petition of the receiver for leave to sell and the answers thereto, said report being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES.

For the Northern District of Illinois.

In the Matter of Alexander Rodgers, Bankrupt. } No. 5810.

To the Honorable Christian C. Kohlsaat, Judge of said Court:

The petition of the Receiver to sell certain property claimed to be in its possession, and sundry answers of the First National Bank of Chicago, The National Storage Company, and some others, setting up various claims to the said property, and the denial of the right of the Receiver to sell the same, which were by your Honor specially referred to me to hear and report my conclusion thereon, have come on to be heard.

The hearing has been a prolonged one, as there have been many interests involved, represented by many counsel, and there has been a great deal of evidence taken in this matter. No evidence, however, was taken on the question of the necessity or advisability of a speedy sale of the property in question, such proof having been rendered unnecessary by my views hereinafter expressed.

It appears that the bankrupt was engaged in the business of a dealer in seeds, principally timothy, and had a warehouse in Chi-

cago in which he stored the same, and also in which he carried on his business, especially the cleaning of said seeds and packing
37 them in bags, and selling by sample or through correspondence.

The question before me arises out of the fact that the bankrupt had dealings with the National Storage Company, and warehouse receipts were issued for almost all of the seeds in his warehouse. The holders of these receipts, as well as the National Storage Company, claimed that the seed belongs to them and not to the Receiver. The National Storage Company, incorporated under the laws of the State of Illinois, was engaged in what is called "Warehousing business" and classified as a "Warehouse of Class C." That is to say, it was engaged in issuing receipts on property that was separated and divided into lots, and not issued on grain in bulk, as is the case in warehouses of classes "A" and "B." The National Storage Company had no warehouses of its own, and its business was carried on by taking a lease of a part or all of the premises occupied by a customer, fixing its name on said premises, or posting notices thereon, and issuing receipts on property stored therein by its customers, such receipts, it being claimed, were negotiable under the State law and passed the title of the property. The premises in question consisted of a large warehouse building situated at 220 to 230 Johnson Street, Chicago, and consisted of six stories and basement, with an elevator and stairway connecting all the floors. The North half of the building was occupied by an electric company, the bankrupt being a lessee from a common lessor of a portion of the other half of the said building, the premises being divided by a partition separating the two tenements on all the floors. The leases to the bankrupt, and from the bankrupt to the storage company, were of certain floors and
38 parts of floors of that part of the warehouse South of the partition before mentioned, i. e. South of the tenement of the electrical company.

On the 31st. day of August, A. D. 1900, the bankrupt executed a lease to the National Storage Company of the basement and second floor, the North half of the third and fourth floors, and all of the fifth and sixth floors, of said South half of said warehouse building, for the term of three years, for the purpose of the storage of personal property. This lease was made in connection with a contract between the bankrupt and the National Storage Company. The rent reserved was nominal. The agreement with the bankrupt to store property and to issue warehouse receipts therefor, upon certain terms and conditions specified in the contract, upon specified

storage rates, constituted the substantial consideration for the lease.

The premises included in the lease appear by the evidence to have been the entire premises of which the bankrupt was the lessee from the owner, but it appears from the evidence that the bankrupt had, with the consent of the owner, the possession and use of portions of the building not included in his lease from the owner, temporarily from time to time, and not included in his lease to the National Storage Company, namely, the first or main floor. Upon the execution of the lease, the National Storage Company proceeded to take possession of the premises leased by it from the bankrupt by tacking on the walls of the several floors notices, each being made of enameled tin, about three by seven inches in size, with white letters on dark blue ground, said signs being eight (8) in number, and distributed on the several floors and containing
39 the following, "This property controlled by the National Storage Company as public warehouse. Warehouse premises No. 281". Said signs were placed some seven or eight feet from the floor on the side of the building and on partitions between the premises in question and the premises and the electric company. No signs were placed on the outside of the building. On the same day it so posted notices it received application from the bankrupt for the storage of ten lots of timothy seed, each lot containing about 250 bags, and each lots of bags being piled up about five and a half to six feet high laterally in two rows, with the ends of the bags of the rows abutting each other, and usually with a pile of bags lying laterally one above the other in front of the space between the two rows of bags, with one-half of each of the bags in front of each of the two rows.

The application was in form as follows:

"APPLICATION FOR STORAGE WARRANT.

Chicago, Ill., Aug. 31st, 1900.

To the National Storage Company, Chicago.

For the purpose of obtaining your storage warrants the subscriber has placed in your warehouse premises No. 281, located at #220-#230 Johnson Street, Chicago, Illinois, the following property, to wit:

Bags	Property	Weight	Marks	Div.	Sec.	Floor	Lot No.
250	Timothy Seed	31,751	R. N. E.	B.	1.	5.	One.
250.	Timothy Seed	31,071	R. N. F.	B.	2.	5.	Two.
250	Timothy Seed	30,963	R. N. G.	B.	3.	5.	Three.
250.	Timothy Seed	32,033	R. M. Z.	D.	4.	3.	Four.
250	Timothy Seed	30,924	R. N. H.	D.	5.	3.	Five.
225	Timothy Seed	29,751	T. 66795	D.	6.	3.	Six.
250	Timothy Seed	30,065	C. O. F-1	D.	7.	3.	Seven.
250	Timothy Seed	30,625	T/61974	D.	8.	3.	Eight.
238	Timothy Seed	29,810	t/66780	D.	9.	3.	Nine.
250	Timothy Seed	32,300	r. M. Y.	D.	10.	3.	Ten.

It is hereby certified that this property belongs to the undersigned, is in good mercantile condition and free from lien or incumbrance. Said Storage Warrants to be issued to order of Alexander Rodgers, in accordance with proposal for warehousing contract dated August 25, 1900, of which this application and the valuation memorandum bearing same warrant numbers, and of even date herewith is hereby made a part.

ALEX RODGERS."

Upon receipt of the application, the inspector and custodian (so-called) of the National Storage Company, went to 220-230 Johnson Street, counted the bags of timothy seed in each of the lots mentioned, and placed a card on each lot about four by six inches in size, calling for the lot number, the section number, and the number of bags contained in the pile, the card being attached at the front of the middle row of bags piled up laterally in front of the double row. Upon this card was printed, mainly in letters about one-quarter of an inch in height, the following words:

"Warehouse Card
NATIONAL STORAGE COMPANY
Date August 31, 1900,
Lot No. 8, Sec. No. 8,
250 Bags
Timothy Seed

No Disturbance Permitted While This Cars Is Posted."

The lot and section numbers corresponded in each instance with the section in which the same were located.

The sections where the several lots of Timothy seed were stored were marked by wooden signs about eighteen inches to two feet

square, painted upon or fastened upon beams of posts immediately R
over the front of each section, and the section number on the tag on any given lot corresponded with the section number on the sign immediately over the front part of the lot. These signs indicated the division, and the number of the section in the division. One of these signs contains the following words: "Div. No. E,
41 Sec. No. 8."

The testimony satisfies me that there were no wooden signs as to division and section on the second floor, although there is some evidence which claims there were, but the evidence satisfies me that the five lots located on that floor were in any even segregated, and that tags were attached as above described, bearing the lot and section numbers, description of property, weight and number of bags corresponding, and with the warehouse receipts issued therefor.

The dividing line between the sections was an imaginary line, indicated neither on the floor nor on the wall.

Having inspected and tagged each of the ten lots, he endorsed upon the margin "Inventoried by E. C. Rand", (the name of the inspector), and storage warrant Nos. 8401 to 8410, both inclusive, were issued upon the ten lots of timothy seed, said warrants corresping in form, except as to the number of bags, weight, division, section, floor and lot number. The first of the warrants was in the following form:

"Received 250 bags timothy seed, 8401.
Said to weigh, Lot No 1
31,751 pounds.

WARRANT.

The National Storage Company, office 217 First National Bank Building, Chicago, hereby acknowledges to have received 250 bags timothy seed, said to weigh 31,751 pounds, contained in division B. Section 1, Fifth floor, at its warehouse premises No. 281, located at 220-230 Johnson Street, Chicago, Illinois, and will surrender the same to the order hereon of Alexander Rodgers, upon payment of charges and delivery of this warrant, at its office, Chicago duly endorsed.

It is agreed that this Company is not responsible for los or damage to property occasioned by fire, water, leakage, vermin, ratage, shrinkage, accidental or providential causes, riot or in-
42 surrection, frost or change of weather, or from being persihable while in storage, and that this Company shall, in the cus-

tody of the above property, be the agent of the nolder of this warraut.

(Signed) NATIONAL STORAGE COMPANY,
C. B. BOUTON,
President,
WALTER TODD,
Secretary.

Record Book .....
Page .....
Storage and charges as per contract on file in this office.
Chicago, August 31st, 1900."

This substantially, was the method of procedure on the issuance of warrants by the National Storage Company to the bankrupt, differing slightly only in detail. For instance, a little later the National Storage Company changed somewhat the form of its tag, so that it read as follows:

"NATIONAL STORAGE COMPANY
Warehouse No. 281
This card must not be disturbed or obscured.
Dated, December 14, 1900.
Lot No. 36,
Div. No. E, Sec. No. 8.
No. in pile, 250 bags tomothy seed."

This is, however, evidence on which there is a divergence of witnesses, to the effect that Rodgers obtained a receipt before inspection and tagging.

When it was desired to have the seed on which these receipts had been issued removed from the warehouse, application was made on a printed blank of the storage company, and it issued its release of the same on the surrender of the receipt, and the receipt was cancelled, the release delivered to the bankrupt, and the property shipped by the bankrupt from the warehouse. However, in
43 some instances the bankrupt shipped out the property before the receipts were cancelled, although there is no evidence that the Storage Company knew it.

The bankrupt hypothecated some of these receipts with the First National Bank of Chicago, to secure loans to about $12,000, and some of them with W. H. Rogers & Bro. to secure a loan of $5,000. and he sold seed to other parties by delivery of the receipt and receiving the value thereof, all of which parties now come in and set up their aforesaid claims and ask that the Receiver be not allowed to sell the property in question, but that it surrender the same to

them respectively, or to the Storage Company, as their agent. There is a substantial equity in the seed pledged to the First National Bank, and also in that pledged to H. W. Rogers & Bro.

The bankrupt occupied and used the premises in his business after he had made the lease with the Storage Company the same as he had done before, except as otherwise stated herein. He occupied under a lease from the owner of the premises running from January, 1899 to April 30, 1902, under which he continued to pay, or be responsible for the rent. The said lease between him and the Storage Company provided that said Company should for the convenient moving of property have free from cost of operation the use of elevators, tracks, cars, scales, and any other fixtures or appliances that said Rodgers had or might acquire during the term of the lease. Said bankrupt had and used in his business during the time of said lease, and until the date of his failure, certain machinery consisting of mills and spouting, H. P. electric
44 motors, dust collectors, shafting, pulleys, and belting on the said premises. This machinery was used for sifting, screening or cleaning seed, and for grading, sacking and handling the same.

The floors were large open floors, about sixty by one hundred feet in size, and have no partitions except that the West end of the second floor was partitioned off and used as an office by the bankrupt. The entrance to the premises was by a door from Johnson street in the West end of the building, the keys to which were kept and controlled by Rodgers and his employes. There was also a door on the main floor and one on second floor through the partition between premises in question and electric company's premises. There was a stairway from the first floor to the basement, and stairways on the South side of each floor leading to the next floors above. The bankrupt made some use of the first floor by consent of the owner, and also the other portions of the half floors included in his lease.

The agreement between the bankrupt and the storage company provided for the payment of seven and fifty one-hundredths dollars storage per month on $10,000. worth of property stored, to be paid by the bankrupt, and seventy-five cents per $1,000. for property in excess of $10,000.

After the lease was made and the first receipts were issued the storage company sent its inspector (so-called) to examine the property covered by the receipts, and to see that the same was in order and that the cards were in place, etc. He testified that he visited the premises of the bankrupt on an average of from fifteen to eighteen times a month. Witnesses for the Receiver do not admit

having seen him as often as that, but I consider it suffi-
45 ciently proved that the visitation was made as often as claimed.

The keys of the outside doors of the premises were retained by the bankrupt and his clerks. The bankrupt continued to do his ordinary business in the premises after his lease to the storage company, maintaining an office with sundry clerks and workmen about the premises. He bought and shipped seed, cleaned the same, and he testified that he occasionally cleaned seed on which receipts were issued, and which were thus in storage, by taking it out of the bags, cleaning it, and restoring and adding a sufficient amount of other seed to equalize the loss in the cleaning.

It does not appear that the bankrupt used the storage company warrants, except when he desired to hypothecate the warrants to secure loans of money, or to use warrants for replacement of warrants on other lots of seed which he wished to have released. Except also, in some cases when he made a sale of a lot of seed, he sometimes would draw a draft against the shipment, which he would use with the First National Bank, and have the warrant, till then held by the Bank, forwarded to the purchaser and drawee.

It also appears that the bankrupt, from time to time, as the exigencies of his business prompted him, brought seed to the warehouse and substituted it for seed on which receipts had been issued, removing the seed on which receipts had been so issued, but replacing the tags on the bags substituted at the time. This was done in many instances, and sometimes several times with the same property covered by one receipt.

It does not appear to my satisfaction that actual knowledge
46 was brought to the storage company of this practice of the bankrupt of substituting seed. One witness testified to a conversation with the inspector of the storage company, which might indicate such a notice, but this is denied. It is, however, claimed, as a matter of law, that the storage company should be charged with notice of what took place on the premises leased by them, and their inspector was there often enough to have discovered it.

I do not think that the storage company is to be charged with notice of this substitution. I am satisfied, however, from the evidence that the storage company had notice of the cleaning of the seed by the bankrupt, and of the temporary withdrawal of the same from the bags and places where they were so stored for the purpose of cleaning. The cleaning, however, was a matter which took but little time, as it was an automatic operation occasioned by puring the seed through a hole in the floor, passing it through pipes from one floor to another, and so cleaning en transit.

Another fact to which attention has been called is the question of the possession that was taken by the Receiver at the time of his appointment. It appears that on May 8th. at ten A. M. when the Receiver undertook the possession he found on the premises only employes of the bankrupt, who turned over the sole key to the Receiver, who immediately put its custodian in charge. After the Receiver had taken possession of the premises in question, the attorney for the storage company called on the Receiver and made claim in substance that there was property belonging to the storage company on the premises in question, and requested permission to put a custodian in charge. The Receiver did not understand fully what the claim of the title of the storage company was, and
47 perhaps misunderstood it, but it authorized the storage company to put a custodian on the property, and that said custodian, with others to help, has been on the property ever since the evening of May 10th. together with the custodian of the Receiver, and it is claimed by the storage company that they are now in the lawful custody and possession of the aforesaid property, and dispute the fact that the Receiver is in custody of the said property. The bankrupt was adjudicated May 10th.

I am of the opinion that whatever the Receiver did, it being an officer of the Court and acting without authority in the matter, or any instructions, and being, as it said, under a misapprehension of the facts of the case, should not be taken as in any way affecting the rights of the parties in the premises. I am of the opinion that the status could not have been changed by any action of the Receiver from what the situation was at the time of its appointment, and that this matter should be decided on the facts as they were at the time the Receiver was appointed, and not by any subsequent conduct of either party.

It is contended on behalf of the Receiver and general creditors that the warehouse receipts were null and void as against the claims of creditors in bankruptcy; that the issuing of the same was an attempt to create a secret lien void by the chattel mortgage act; that the business that the storage company undertook to do was not lawful and that even though its business scheme might have been valid, if carried out properly, it was not carried out so as to create a valid title in the hands of the receipt holders; that the notices and
48 tags were insufficient to constitute a notice that would be sufficient in law; that the lease in question, being a lease of the entire premises occupied by the bankrupt, was contradicted by the bankrupt remaining in possession and carrying on his business, and it therefore should be treated as fraudulent; that the possession by

the bankrupt of the premises, and the keys, was inconsistent with any possession or title of the storage company. And that further, all these objections are valid in the bankruptcy procedure, although they might not have been tenable if the proceedings were under an assignment in the State Court, or in a contest between the bankrupt himself and the receipt holders, or the storage company.

The case of the Union Trust Company vs. Trumbull, 137 Ill, 146, involved the business of the storage company in question and was decided ten years ago. In that case there was an assignment in the County Court, and a contest arose between the holders of receipts and the assignee. The Court held, on the pointing out of sundry objections to the receipts that were then in question, that the holders thereof had an equitable lien, although their receipts were invalid at law as against general creditors (there being no attaching creditors involved), which was good against the assignee. It is strenuously insisted on behalf of the present holders of these receipts and the storage company, that the principle of law there applied is applicable in bankruptcy proceedings, and that the trustee has no better or stronger title than the assignee in the County Court, and that all the equities that could be raised against the assignor and his assignee, could also be raised against the bankrupt and his Receiver in bankruptcy. In the view which I entertain con-
49 cerning the validity of these receipts, it does not become necessary for me to pass on that point, and I shall not therefore attempt to discuss the same.

Criticism was made in the Union Trust Company case of the phraseology of the lease running to the storage company, the lease providing that the lessor should have the "use of such portions of the demised premises as should not be occupied by the parties of the second part."

There was also a defect in the warehouse receipt in that it did not have any word or designation other that Lot "A", Lot "B" or Lot "C", of wool in the warehouse in question, and that such designation did not represent any allotted portion of wool, separated and designated by labels or marks, that the letters "A", "B", "C" and "D", each represented a floor of said premises on which were stored wool in bulk, in excess of any individual receipt, and it was subsequently disclosed that the total receipts issued called for more wool than was actually on storage. Whereas the Illinois Statute on Wareshouse, Sec. 64, provides that all warehouse receipts on property stored in public warehouses of class "C", shall distinctly state on their face the brand or distinguishing marks upon such property. The Court (page 173) says: "Here the endorsements

and transfers of the supposed warehouse receipts to the receipt holders were ineffectual to constitute them valid and legal pledges of the wool to secure the debts for which they were hypothecated, and this, both because the National Storage Company did not have possession and control of the wool, and because the wool mentioned in each receipt was not so set apart and distinguished from other wool as that it could have been found and identified by the
50 receipt. The storage company was not, under the law, authorized to issue warehouse receipts."

I take it that the last few words, namely, "The storage company was not, under the law, authorized to issue warehouse receipts" meant in substance that under the circumstances above described the storage company was not authorized to issue such warehouse receipts, i. e. for grain or wool in bulk such as grain warehouses of class "A" and "B" issue, and not indicating that a storage warehouse, incorporated as this one was and is, was not authorized to issue warehouse receipts such as warehouses of class "C" issue, provided the circumstances and conditions were such as complied with the law: I do not, in other words, understand that this decision holds that the National Storage Company had no right to carry on the business which it undertakes to do, namely, to issue warehouse receipts on property which is stored in premises, or parts of premises, that are sub-let by the proprietor and owner of the goods to the National Storage Company to issue receipts thereon. I do not see anything in the scheme of the business of the company that is contrary to law, if it is properly carried out.

It appears from the following decision that business of this nature is transacted by other companies in other parts of the United States. My attention has been called to a decision rendered by United States District Judge Newman, on or about June 13th, 1900, which was an action brought by the Merchants and Manufacturers Warehouse Company of Georgia, in re Southern Agricultural Works on petition of the Merchants & Manufacturers Warehouse
51 Company. This decision has not been reported, so far as I am informed, in any of the law reports, but is found in the newspaper Constitution, printed at Atlanta, of that date. This decision in substance sustains the validity in the bankruptcy court of receipts issued by a company which was engaged in the same line of business as that of the National Storage Company, i. e. issuing receipts on property stored on premises leased from the customer. Of course the local law of the State must govern in regard to such question.

Aside from the decision of the Union Trust Company, above

referred to, there does not appear to have been any decision in Illinois exactly in line, or involving these questions, excepting the case of Hoffman vs. Schoyer, 143 Ill. 588. In this case the question of the validity of warehouse receipts were challenged for the reason that they did not sufficiently state on their face the brands and distinguishing marks on the property, and furthermore for the fact that other property had been substituted for that on which the receipts had been issued, being property of the same character. The Court, in discussing the question, pages 616 and 617, calls attention to the fact that there was no penalty imposed by the statute for issuing warehouse receipts for property stored in warehouses of class "C", which did not so state on their face the brands or distinguishing marks, and stated: "Under these circumstances, we would be reluctant to hold a receipt of that character to be void as against an assignee for value." And that as to the objection that the omission to have brands or distinguishing marks vitiates the receipts because of the impossibility to distinguish them or
52 separate the property covered by the receipts respectively from the amounts of general merchandise with which it was mingled, was a question that would not arise in that case, excepting as between an execution or judgment creditor and the receipt holder, and in which event, "The question might perhaps be an embarrassing one."

It was further held that the substitution of other property for that on which the receipts were issued originally, would not in that case be open to attack, because of the estoppel which rested against the original owner of the property, which would also run against the Receiver in equity, as well as against an assignee under an assignment; that the substitution of such property was a fraud on the holders of the certificates.

In each of these two cases it will be observed that the Court allowed the equitable lien of the holders of the certificate to attach on the grounds of estoppel, and that the Receiver in equity, as well as the assignee in the County Court, and the creditors who claimed thereunder, were covered by the same estoppel; but without deciding the proposition which was made apparent in this last named case, that if it were not for the ground of estoppel, but was the case of an attaching creditor, they would hold that the substitution of similar property of the same value, character and kind, for property on which receipts were originally issued, would vitiate the receipts in the hands of the assignee for value. The question of substitution, therefore, has not been adjudicated in either of these cases, and the question must be treated as one still open.

53 The mode of doing business being legitimate, as I think is undoubtedly the case, the particular incident whether the National Storage Company so lived up to its undertaking as to entitle holders of receipts, remains to be considered. I think the lease made to it by the bankrupt and the possession thereunder, as herein set forth, was sufficient for the purpose of accomplishing the end desired, namely, to be sufficient to entitle the storage company to the possession of the premises, and its possession was thereby sufficient to entitle it to issue receipts on property placed in its custody. The decisions to which attention has been called, which are those of a fraudulent vendor retaining possession with only a slight color of possession of the vendee of the property, are not in my opinion applicable to the situation. The motives of the parties in making this arrangement are not claimed to have been fraudulent, nor is there anything to justify any such supposition. The bankrupt desired to borrow money on, or to sell his merchandise. To accomplish it by the way of issuing receipts thereon was more convenient than any other way, and if it was a compliance with the Illinois Warehousing Statute, enabled him by assigning the receipt to "transfer the property represented by such receipts." To have taken the seed to some public warehouse and there stored it, and then issued receipts, would have been expensive. It is true the lease was for a nominal sum and was merely for the purpose of giving a technical value or possession to the warehousemen, so the warehousemen could issue receipts thereon. Was the retaining the key of the warehouse, the employment of the bankrupt of his assistants on these premises, inconsistent with the possession 54 by the Storage Company? It is claimed that because there was no part of the premises remaining in him after the lease to the storage people, therefore his continuing therein was inconsistent with the possession of the storage people; that both could not be in possession of the same piece of property at the same time. It seems to me clear that the bankrupt had no authority to interfere in any manner with the goods stored. This is clear from the provision of the contract and the lease, and the bankrupt so testified, except he testified he requested permission to clean seed and replace it, adding enough of additional seed to make up for the loss in the weight from cleaning. Rand, the inspector, who gave him the permission, as the bankrupt testified, denies having done so. Whether such permission was given or not, seems to me to be unimportant in this case. The storage people were lawfully in possession, in the manner herein indicated, and the bankrupt's possession was subordinate thereto and not in derogation or opposition to that of

ree. the storage people. The bankrupt was there by sufferance under the storage people.

Attention is called to the case of Best vs. Fuller Company, 185 Ill. 43, which is that of a conveyance of personal property absolute on its face, but which was really intended as a mortgage, was fraudulent as to creditors because of the secret trust which existed between them. A debtor made an ostensible sale of his store to a creditor, the property being worth two or three times the amount of the debt, and after the transfer the vendor remained in possession as a clerk of the vendee, paying himself a small salary for his services, carrying on the business to all the world the same
55 as before, and the only visible change of ownership was a small sign over the front door on which the name of the purchaser was written over the name of the vendor with the words "Successor to", and also a card sign over the cash register.

Decisions of this kind are not hard to find. Fraud is found from the circumstances of the transaction, and as indicative of fraud the absence of sufficient notice of the change of ownership is shown. If the question of the possession of the premises depended solely on the conduct of the parties, without relation to the storage business, I should not hesitate to say there had been no sufficient change of possession, but taken in connection with the fact that the signs were put up, such as I have above stated, and tags placed on the personal property, that it was sufficient notice to any and all persons who might have occasion to know by going to the building and going inside, that the bags were in the possession of the storage company, and that the floor, or part of the floor on which the bags were stored, was consequently the floor of the storage company. The fact that the storage company had a lease for more property than it actually had occasion to use, and that the bankrupt enjoyed the use of that other part of the premises, does not, in my opinion, destroy the effect of the notice. In other words, it seems to me the question is, would an attaching creditor or a purchaser, going in there and attempting to levy on or buy the property in question, as the property of the bankrupt, be notified by the signs and tags thereon that it was not the property of the bankrupt, but the property of the National Storage Company. I think that such a purchaser or attaching creditor would so find out that the property was not the property of the bankrupt, but the property of some one else.

56 This is not a question of actual fraud. The conduct of all the parties was in good faith, without intent to cheat or defraud any one. The substitution of seed by the bankrupt for that

on which receipts were issued or not, so far as appears, done from any motive to defraud any one. His object does not appear—presumably convenience in carrying on his business. In every instance he substituted, it was done without delay.

In the case of Chattel Mortgages it has been held that property substituted for that mortgaged, but of like quality and kind, if with the consent of the mortgagee, is no longer subject to the mortgage as against the claims of attaching creditors. (Simmons vs. Jenkins, 76 Ill. 479, and cases cited). If without the knowledge and consent of the mortgagee, equity might relieve the mortgagee. (See Dunning vs. Stearns, 9 Bart. 630, cited in Simmons vs. Jenkins). The dictum in Simmons vs. Jenkins would indicate that the Court is of the opinion that even then the mortgagee must have first got possession before the creditor (p. 483).

This is, however, the case, not of a chattel mortgage in which the possession remains with the mortgagor, but of a sale, or rather the delivery of the property to a trustee (the storage company) to hold for the benefit of whoever might be the owner, i. e. holder of the receipts. The segregation of the property, and disposition by tags, notices, etc., was sufficient notice to the world. It is sufficient notice to the world if the vendor separates them at the time of the sale from the general stock, and so marks them with the name of the purchaser. Could it be said that such vendor, after so
57 separating and marking goods, removes them and substitutes other similar goods, replacing the tags or marking them as the original, that the vendee has lost his goods as against a creditor who attaches after the substitution has been made?

It is held that he who commingles the goods with another with his own, does it at his own risk, and the other loses no title thereby, but may retake his own, or rather, out of the common stock, sufficient to equal his own (Diversy vs. Johnson, 93 Ill. 547).

To hold in this case that the receipt holders have lost their title through the fault of Rodgers substituting other seed for that which he had delivered to the storage company and had sold, would be inequitable, and I would require a convincing authority to induce me so to decide.

I do not think it necessary to pass on the question raised by the receipt holders that the trustee in bankruptcy has no better title than the assignee in a State Court, as it becomes unnecessary in my view of the situation above expressed.

I think it satisfactorily appears from the evidence in the case, and I find, that the bankrupt was not, at the date of the filing of his petition in bankruptcy in this case, or at the date of the adjudi-

cation of bankruptcy, in possession of the property mentioned in the answer of the National Storage Company and the First National Bank to the petition included in this reference, and that the Receiver (now trustee) of the bankrupt, had not, at the date of the filing of the petition, or of the adjudication in this case, and has not, possession, or right to possession, of said property.

58 That there were, at the time of the filing of the petition, storage charges due to the National Storage Company, which are still due and unpaid (p. 622).

It seems to me to be satisfactorily shown by the evidence in the case, and I find, that the National Storage Company was, at the date of the appointment of the Receiver in this case, in possession of the property designated in its answer filed in this case, that it was in possession of the premises in which said property was stored under its lease from the bankrupt, and had been so continuously from the 31st. day of August, A. D. 1900, and that it is entitled to the present possession of said premises and such property.

It also seems to me to be satisfactorily shown by the evidence, and I find, that the warehouse receipts of the National Storage Company for the property mentioned and described in the answer of the National Storage Company herein, were good and sufficient warehouse receipts under the statutes of the State of Illinois, and were transferrable under the endorsement of the bankrupt, and that the endorsement of the warehouse receipts by the bankrupt to the First National Bank, H. W. Rogers & Bro., Small & Co., and Kirkpatrick & Co., constituted valid transfers of the property represented by such receipts.

I therefore recommend that an order be entered, finding that the Receiver in this case had not, at the date of the filing of said petition, the right of possession of the property designated in the answer hereto of the National Storage Company, the First National Bank, H. W. Rogers & Bro., Small & Co., and Kirkpatrick

59 & Co., that the National Storage Company was at said date entitled to possession in law, and is entitled to the present possession, of such property. I further find there are unsecured creditors of the bankrupt to a considerable amount.

Petitions of J. F. Harris & Co., Eschenberg & Dalton, Warner & Wilber, Frank E. Winan, set up claims in the nature of equitable replevin as to portions of said property on which the warehouse receipts of the National Storage Company were issued. Since it does not appear from the evidence in this case that the Receiver or trustee has possession of any of the property mentioned in these petitions, the Court cannot, in my opinion, maintain jurisdiction

in the matter of these petitions, and I therefore recommend that an order be entered dismissing them and each of them.

I return herewith, as a part of this report, a transcript of all the testimony taken before me, together with a copy of all the exhibits offered in evidence.

Respectfully Submitted.

SIDNEY C. EASTMAN
Referee in Bankruptcy.

The objections filed by James A. Patten by Joseph E. Paden and by the trustee are overruled.

The objections filed by National Storage Warehouse Co. filed by Heckman. Elsdon and Shaw are overruled with the exception of objections No 4 being clerical errors which are corrected on the face of my report.

SIDNEY C. EASTMAN
R.

Objections to this report must be filed by twelve o'clock M. August 3rd. 1901.

60 (Endorsed) No. 5810 In the District Court of the United States for the Northern District of Illinois. In the matter of Alex. Rodgers Bankrupt. Sidney C. Eastman Referee in Bankruptcy. Refs. Rep. Filed Aug 5 1901 at 10 o'clock A. M. T. C. MacMillan Clerk.

61 And afterwards, to wit on August 5, 1901, there was filed in the Clerk's Office of said Court in above entitled matter, the Objections of the Chicago Title & Trust Co. to the Referee's Report, said Objections being in the words and figures following, towit:

IN THE DISTRICT COURT OF THE UNITED STATES.

Northern District of Illinois.

Northern Division.

In the Matter of
Alexander Rodgers.
Bankrupt. } No. 5810.

Now comes the Chicago Title & Trust Company, Receiver and etc herein, by Newton Wyeth, its attorney, and objects to the report of the Hon. Sidney C. Eastman, Referee herein, in the matter of the petition of said Receiver and the answers of sundry parties thereto, which was heretofore referred to said Referee, and says:

1. For that said report, on page 2, finds that the National Storage Company was engaged in what is called warehousing business, and classified as a warehouse of Class C, whereas there is no evidence to support such finding, but the evidence shows and the finding should be that said storage company was not doing a warehousing business.

2. For that said report, on page 3, finds that the bankrupt executed a lease to the National Storage Company, and that the agreement with the bankrupt to store property and to issue warehouse receipts therefor upon terms specified in the contract and upon storage rates constituted the substantial consideration for the lease, whereas under the evidence said finding should be that the bankrupt executed a lease in form merely, and that said company by said agreement agreed to issue warehouse receipts on the bankrupt's property in said premises on application of the said bankrupt from time to time, and for the warrants so issued said bankrupt should pay so called storage of $7.50 for ten thousand dollar's worth of property, and 75 cents for each additional $1,000 worth of property per month, payable each quarter yearly, and also that no consideration was paid for said lease as such.

3. For that said report does not find, but should find, that except by visiting the said premises by its inspector from time
62 to time in inspecting, tagging and examining lots or piles of seed, and in signing or approving applications of said bankrupt for warrants, said National Storage Company did not visit, use or possess said premises, but transacted all of its business as to said warrants and storage with the said bankrupt at the office of the

said storage company, in the First National Bank building, Chicago.

4. For that said report, on page 3, finds that said stroage company after the execution of the said lease took possession of the leased premises by tacking upon the walls certain signs as mentioned in said report, and holds that the same, together with the inspection, tagging and issuing of warrants on certain piles of seed in said premises, and making formal releases of same, constituted a possession of said premises and of said seed by said company, notwithstanding said bankrupt by himself and employees always continued in the actual use and possession of the said premises in his regular business.

5. For that said report finds, on page 6, that there is some evidence that there were divisions and section signs on the second floor, whereas the said report should find that there is no evidence in those respects, and no signs upon the second floor of division or section.

6. For that said report finds, on page 7, that "this substantially was the method of procedure and the issuance of warrants by the National Storage Company to the bankrupt, differing slightly only in detail" and that "there is however evidence on which there is a divergence of witnesses to the effect that Rodgers obtained a receipt before inspection and tagging", whereas said finding should be that the bankrupt frequently obtained warrants from the storage company before the goods were inspected and tagged.

63 7. For that said report finds, on page 8, that in some instances the bankrupt shipped out property before the receipts (warrants) were cancelled, although there is no evidence that the storage company knew it, whereas such finding should be and the evidence shows that in a number of instances the bankrupt shipped out property before the receipts were cancelled or the property inspected out and released, and great preponderance of evidence shows that the storage company must have known the said circumstances of shipment before inspection, release and cancellation of warrants.

8. For that said report finds, on page 8, that under said lease the storage company should have for the convenience of moving property free from cost of operation the use of elevators and other fixtures and appliances, yet said report should find also, and the evidence shows, that said storage company never in any instance made any use whatever of any of such elevators, fixtures or appliances, by any of its officers, agents or employees, directly or indirectly, but all handling, and removing of all seed and property in said premises was done by the said bankrupt and his employees

for him in the conduct of his own business, the same after as before the said lease was made.

9. For that said report does not find, but should find from the evidence that any storage paid by holders of said warrants other than said bankrupt, and aside from the 75 cents per thousand dollars paid by said bankrupt to said storage company, was paid by such holders directly to said bankrupt, but there is no evidence that the First National Bank or H. W. Rogers & Bro. paid or were obligated to pay any storage.

10. For that said report does not find, but should find under the evidence, that the releases and removal permits were trans-
64 actions only by and between said storage company and said bankrupt, and the removals of property were made only by said bankrupt.

11. For that said report does not find but should find under the evidence that the only sign on the outside of said premises on Johnson Street, was upon the grain delivering spout, a wooden spout extending from the second floor from the front of the said building down over the side walk to the street, on which was the sign "Alexander Rodgers, Seed Merchant."

12. For that said report finds, on page 22, that the bankrupt was not at the date of the filing of the petition in bankruptcy or at the date of adjudication in possession of the property mentioned in the answers of the National Storage Company, First National Bank and H. W. Rogers & Bro., and that the Receiver had not at the date of the filing of the petition, and the adjudication, and has not possession or right of possession of said property, and that (page 23) the National Storage Company was at the date of the appointment of the Receiver in the possession of the said property and of the premises in which the property was stored under its lease from the bankrupt, and had been so continuously from August 31, 1900, and that it is entitled to the possession of the said premises and property, whereas said finding should be that the bankrupt had been in possession of the said premises and the property therein since August 31, 1900, an was so possessed at the date of the filing of the petition of bankruptcy herein, and on said date delivered the possession of said property and the only keys of the said premises to the Receiver herein, and that no objection was made at the time to the Receiver's so taking possession by any one, and nothing was said to the said Receiver, its custodians and agents, and said Receiver did not know, that any other person held or claimed
65 to hold any possession of said premises or of said property, and that said Receiver is entitled to hold possession of said premises and property, and is still in possession thereof.

13. For that said report finds, on page 23, that the warehouse receipts of the National Storage Company were good and sufficient receipts under the laws of Illinois, and were transferable under endorsement of the bankrupt, and that the endorsement of them by him to the First National Bank, H. W. Rogers & Bro. Small & Co. and Kirkpatrick & Co. were valid transfers of the property represented by said warrants, whereas said finding should be that said warrants were not good and sufficient warehouse receipts to transfer the property called for by endorsment of the bankrupt to said Bank, said Rogers and Bro. said Small & Co or said Kirkpatrick & Co. or any of them, and also that such transfer of said warrants to said bank and said Rogers & Bro. did not constitute good and valid pledges as security to them for indebtedness owing by said bankrupt to them respectively, as against the rights and interests of the said bankrupt estate and the general creditors thereof.

14. For that said report does not find but should find under the evidence that schedule A 2 of the bankrupt in this cause discloses an indebtedness to the First National Bank and H. W. Rogers & Bro. of $18.312.50, and schedule A 3 discloses indebtedness to different creditors in total amount of $45.563.18; also that bankrupt is indebted to unsecured creditors other than First National Bank & H. W. Rogers & Bro. in a considerable amount.

15. For that said report does not find but should find, from all of the other facts as set forth in said report that at the time of the appointment of the Receiver herein and the adjudication in bankruptcy herein the said bankrupt was in possession of, and delivered the possession of said property, specified in the answers of the National Storage Company, First National Bank and H. W. Rogers & Bro. to the said Receiver, and that said Receiver
66 rightfully has continued to hold possession thereof ever since, and said report should also find that said pledges claimed by said First National Bank and H. W. Rogers & Bro. are invalid and void herein.

16. The Receivers objects for that said report is contrary to the law.

17. For that the said report and the conclusions and the recommendations thereof are contrary to the evidence in the case.

18. For that said report recommends an order to be entered finding the Receiver ahs not possession or right of possession of the property set forth in said answers, of the National Storage Company, First National Bank, and H. W. Rogers & Bro. and Small & Co. and Kirkpatrick & Co., and that National Storage Company, was at the date of the filing of the petition in bankruptcy entitled

to and is entitled to the present possession of the said property, whereas said recommendation should be that an order be entered that said Receiver was and is entitled to the possession of said property described in said answers of said bank and Rogers & Bro., and also, the said property shown in the evidence to have been purchased by Small & Co. and Kirkpatrick & Co.

19. In all and sigular in which matters and things, the said Chicago Title & Trust Company as representative of said bankrupt estate and for the use of the creditors thereof, objects to said report and submits that the same should be modified and altered.

THE CHICAGO TITLE & TRUST COMPANY
by NEWTON WYETH
its Attorney

Endorsed: 5810 In re Alex Rodgers Bankrupt Objections of Chicago Title & Trust Co. to Referee's Report Filed Aug. 5, 1901 at 10 o'clock A. M. T. C. MacMillan, Clerk. Newton Wyeth Atty.

67 And afterwards, to-wit, on August 5, 1901, there was filed in the Clerk's Office of said Court in above entitled cause the Objections of James A. Patten to Referee's Report, said Objections being in the words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois.

In the Matter of
Alexander Rodgers, Bankrupt } #5810

And now comes James A. Patten, the principal creditor of said Alexander Rodgers insolvent, whose claim is a majority of the indebtedness of the said Insolvent, by Joseph E. Paden his Attorney and files the following objections to the report of the Honorable Sydney C. Eastman, Referee in Bankruptcy upon the petition of the Receiver herein to sell the property of the said bankrupt and the answers thereto, said report being filed on or about August 3rd, 1901:

1st: The said report is contrary to the law of the case.

2nd: The said report and the conclusions therein expressed are

contrary to the evidence of the case as submitted to said Referee and reported by him to this Court.

3rd: Said conclusions of said Referee that the National Storage Company was in possession of the goods of the said bankrupt and the premises described in said petition since August, 1900 are inconsistent with the evidenciary facts found by the said Master and are contrary to the law of the case.

4th. The conclusion of said Referee that the National Stor-
68 age Company was in possession of said goods and premises described in said petition on the date of the appointment of the Receiver in this cause is contrary to the facts of the case and is inconsistent with the evidenciary facts found by said Referee.

5th: The conclusion and finding of the said Referee that posting of the eight (8) tin signs over six (6) stories & basement upon the inside of said building and the placing of the one small cardboard tag upon each of certain piles of goods in said premises, constituted a possession of said premises and said goods by the said National Storage Company, notwithstanding the fact that the Bankrupt and his employees at all times, had the exclusive, actual charge and control of said goods and premises, is inconsistent and is contrary to the laws governing such cases.

6th: The finding of said Referee on Page two (2) of his report that the National Storage Company was engaged in the ware-housing business and classified as "a Ware-House of Class C", is not supported by the evidence whatever upon such question.

7th: The finding of the Referee on Page three (3) that a lease existed between the National Storage Company and the Bankrupt, is not supported by the evidence as said document called a lease was in fact only a pretended lease and no rent was paid thereunder and no possession taken by said National Storage Company.

8th: The finding of the Referee on page six (6) that there is some evidence which claims there were wooden signs as to divisions and sections on the second floor, is not justified by the evidence inasmuch as there was no evidence at all that there were such signs.

The finding as to the signs on the second floor should be that there were no signs whatever upon said second floor.

69 9th: The finding on Page seven (7) that "this substantially was the method of procedure and the issuance of warrants by the National Storage Company to the Bankrupt differing only in detail—there is, however, evidence upon which there is divergence of witnesses to the effect that Rodgers obtained a receipt before inspection and tagging", is not justified in any respect by the evidence submitted in the case and is particularly in con-

flict with the evidence of the Bankrupt on Pages 333 to 342 & 361 to 365 of his testimony.

This finding should have been that there was no particular method of procedure followed between the National Storage Company and the Bankrupt and that in frequent instances the Bankrupt obtained receipts before the goods were inspected and tagged.

10th: The finding of the Referee that the property be not sold under the direction of the Trustee on account of receipts being hypothecated with the First National Bank and H. W. Rogers & Bros., is not in conformity with the Bankrupt Act and is further inconsistent with the fact that the Bankruptcy Court is the only Court that can pass upon the validity of the claims of said First National Bank and H. W. Rogers & Bros. as against other creditors of the Bankrupt, and further said Bankruptcy Court is the only Court that can pass upon the priority of liens between the creditors and the said Bankrupt.

11th: The finding of the Referee on Page nine (9) of his Report that the so-called Inspector of the National Storage Company visited the premises of the Bankrupt on an average of fifteen
70 (15) to eighteen (18) times a month is not warranted by the evidence submitted in the case.

12th: The finding of the Referee that the agreements and methods of doing business between the National Storage Company and the Bankrupt created any lien of the property or passed any title upon the holders of the said Warehouse receipts, is not warranted by the evidence submitted in the case.

JAMES A. PATTEN,
By JOSEPH E. PADEN,
his Attorney.

Endorsed: #5810. In the District Court of the United States, Northern District of Illinois In Bankruptcy. In re Alexander Rodgers, bankrupt. Objections of James A. Patten to Referee's Report. Filed Aug 5 1901 at 10 o'clock A. M. T. C. MacMillan Clerk. Jos E. Paden, Attorney and Counsellor, Title and Trust Bldg Chicago.

71 And afterwards, towit, on August 5, 1901, there was filed in the Clerk's Office of said Court in above entitled matter, the Exceptions of the National Storage Company to the Report of the Referee, said Exceptions being in the words and figures following, towit:

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois.

In the matter of Alexander Rodgers Bankrupt. } No. 5810.

Exceptions of the National Storage Company to the report of the Referee, in the matter of the petition of the Receiver for leave to sell certain property, and the answer of the National Storage Company thereto.

The National Storage Company, without waiving its objection to the jurisdiction of the Court but still insisting upon the same, excepts to the report of the Referee in the following particulars, that is to say:

1. In that the Referee finds, contrary to the evidence, that "in some instances the bankrupt shipped out the property before the warehouse receipts were cancelled."

2. In that the Referee finds, contrary to the evidence, that the Storage Company had notice of the cleaning of the seed by the bankrupt, and of the temporary withdrawal of the same from the bags and places where the same was so stored for the purpose of cleaning."

3. In that the Referee finds that the lease from the bankrupt to the National Storage Company "was for a nominal sum and was merely for the purpose of giving a technical value or possession to the warehouseman."

4. In that the Referee finds (though apparently by clerical error in the preparation of the report) that signs were fastened "upon beams *on* posts" instead of beams *or* posts, and that the tags were attached "bearing the lot and section numbers, description of property, weight and number of bags corresponding *and* the warehouse receipts issued therefor" instead of *with* the warehouse receipt issued therefor; and that the method specified "was the method of procedure *and* the issuance of warrants by the National Storage Company" instead of the method of procedure *in* the issuance of warrants, etc.

72

HECKMAN ELSDON & SHAW
Solrs for Nat Storage Co.

Endorsed: 5810 U S Dist Court In re Alex Rodgers a bankrupt Exceptions of Nat Storage Co Filed Aug 5 1901 at 10 o'clock A M. T. C. Mac Millan Clerk. Heckman Elsdon & Shaw Solcs for Nat Storage Co.

73 And afterwards, to wit: on the 5th day of August, A. D. 1901 the following order was had and entered of record in said cause, before the Hon. Christian C. Kohlsaat, Judge, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA,

For the Northern District of Illinois,

Present the Honorable Christian C. Kohlsaat, Judge.

Whereas, Alexander Rodgers of Chicago, Ill., in said district, has been duly adjudged a bankrupt, under the Acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said Alexander Rodgers be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the 8th day of May A. D. 1901, on which day the petition for adjudication was filed by him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

74 And afterwards, to wit: on the 5th day of August, A. D. 1901 the following order was had and entered of record in said cause before the Hon. Christian C. Kohlsaat, to wit:

In re
5810 Alexander Rodgers,
Bankrupt.

Now coming on to be heard the report of the Honorable Sidney C. Eastman, Referee, to whom was specially referred the matter of the petition of the Chicago Title and Trust Company, Receiver herein, filed May 13, 1901, and the answers of the First National Bank, H. W. Rogers and Brothers, the National Storage Company, James A. Patten, Eschenberg and Dalton, F. A. Winans, J. F. Harris and Company and Warner and Wilbur, it is

Ordered that the objections of the several parties filed before the said Referee to said report stand here as exceptions thereto; and the

court having considered said report and exceptions thereto, heard Or
the arguments of counsel and being advised in the premises, holds that the said receiver received and took possession from the bankrupt peaceably the property in question, namely the several lots of seed described and set forth in the said answers of the First National Bank, H. W. Rogers and Brother and the National Storage Company, in the Warehouse 220 to 230 Johnson Street, Chicago, and that the Court had jurisdiction and possession of the said property in this cause, and the Court sustains the objections and exceptions to said report as to the jurisdiction and possession of the Court; and it further appearing to the Court, on the advice of counsel of the parties hereto in Court, that now is the best and most advantageous time to sell the said seed in question, all parties being in open Court and on the stipulation of Orville Peckham, at-
75 torney for the First National Bank, in open Court, that the said Bank will sell and hold the funds derived from the sale of said seed subject to the further order of the Court herein, it is

Ordered by the Court that the First National Bank have leave to proceed at once to sell the seed named and described in the said answers of said Bank, H. W. Rogers and Brother and the National Storage Company, at the best prices obtainable in the regular course of business and make report to the Court of its acts and doings in the premises with all due speed; and the said James A. Patten, the National Storage Company and the said Receiver severally and by their counsel duly except to the order of the Court directing the First National Bank to sell said seed.

75½ And afterwards, to wit, on the 6th day of August, A. D. 1901, the following order was had and entered of record in said cause, before the Hon. Christian C. Kohlsaat, Judge, to wit:

In re
5810 Alexander Rodgers,
Bankrupt

The report of referee on the petition of the Receiver herein, the answers of the National Storage Company and others thereto, coming on further to be heard, It is

Ordered by the Court that the report of the referee as to the seed claimed for Allen Kirkpatrick and Company and W. H. Small and Company be approved, and that the Chicago Title and Trust Company, receiver, surrender the said lots of seed so claimed by said

Allen Kirkpatrick and Company and W. H. Small and Company to them respectively.

And thereupon the Court reserves the rest of the said report of said Referee for future consideration by the Court.

76 And afterwards, to wit: on the 13th day of September A. D. 1901 there was filed in said cause a report of sale by the First National Bank, said report being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois.

Northern Division.

In Re.
Alexander Rogers, Bankrupt. } No. 5810.

The First National Bank of Chicago Respectfully reports to the Court that under and in pursuance of the Order of Court entered herein August 5, 1901, it sold the seed which H. W. Rogers & Bro. held in pledge from said bankrupt covered or represented by Warrants of the National Storage Company Numbers 9436, lot No. 62; 9227, lot 53; 9155, lot 44; 9224, lot 50, and 9154, lot 43 to various purchasers, and realozed from such sales Seven Thousand Two Hundred and Fifty-six Dollars and Eighty-four Cents ($7,256.84), from which has been paid and deducted the expense of sampling, weighing, and brokers' charges Twenty-six Dollars and Forty-one Cents ($26.41) leaving a balance in said Bank's hands of Seven Thousand Two Hundred Thirty Dollars and Forty Three Cents ($7,230.43), from which is to be deducted the proper charges of the Nations' Storage Company when the same shall be fixed. As to such storage charges the unpaid bill of said National Storage Company is submitted herewith and the Court is asked to consider the same and fix the proper amount thereof. Also attached hereto and made a part hereof are

(1) Statement of sales of seed as aforesaid.

(2) Copies of vouchers for sampling, weighing and brokers' charges aforesaid.

(3) Copy of unpaid bill of the National Storage Company.

77 Said The First National Bank of Chicago further reports that the said sales of seed were made as promptly as possible

after the entry of the order herein aforesaid and were made at the best obtainable prices in the regular course of business and the net proceeds of said sales as aforesaid are held by said bank subject to the order of the Court herein.

THE FIRST NATIONAL BANK OF CHICAGO.
By JAMES B. FORGAN, *Prest.*

State of Illinois, } ss.
County of Cook. }

I, Richard J. Street, being duly sworn, on my oath say, that I am the Cashier of the First National Bank of Chicago and that the foregoing report of said bank is true.

R. J. STREET, *Cash.*

Subscribed and sworn to before me this 13th day of September, A. D. 1901.

JAMES D. WOLEY,
Notary Public.

[SEAL]

78 Sales by H. W. Rogers & Bro., Chicago, Illinois.
Seeds of Alexander Rodgers, Bankrupt, by order of First National Bank of Chicago.

Lot 43	250 Bags Timothy seed.			
28065	Gross			
250	Tare			
27815	Net lbs.	$4.80	1335.12	
Lot 44	250 Bags Timothy seed			
32048	Gross			
250	Tare			
31798	Net lbs.	5.15	1637.60	
Lot 50	250 Bags Timothy seed			
31157	Gross			
250	Tare			
30907	Net lbs.	5.15	1591.71	
	250 bags Mixed 12c per bag	30.00		
	385 " Amer'n 14c per bag	53.90		
	115 " Amos'g 14c " "	16.10		
		100.00		
	Less 31 Cuts 5c " Cut	1.55	98.45	4662.88

Lot 53 250 Bags Red Top
24355 Gross
250 Tare

24105 Net lbs.

225 Bags 22039 Net		10.00	2203.90	
25 " 2066 "		3.00	61.98	
			2265.88	
250 "	12c per bag	30.00		
	5c per cut	.15	29.85	2295.73

Lot 62 221 Bags Buckwheat.
26366 Gross
221 Tare

26145 Net lbs.		1.05	274.52	
221 Bags Mixed 11c		24.31		
Less 12 cuts	5c	.60	23.71	298.23
				7256.84

Charges.

Less 1/2 Weighing 3/4c per bags	9.16	
Brokerage 5 Cars	10.00	
Sampling	7.25	26.41
		$7230.43

E. & O. E.
Chicago, August 21, 1901.

H. W. Rodgers & Bro.

79 Chicago, Aug. 22, 1901.

M. H. W. Rogers & Bro.
In Alex Rodger Warehouse
To Kettles & Ware, Dr.

Telephone, Harrison 2792. Rooms 44-45-46 Traders Bld.

Lot 43	250 Tim. bags	1.25
" 44	250 " "	1.25
" 50	250 " "	1.25
" 53	250 Red Top	2.50
" 62	221 Buckwheat	1.00
		7.25

Paid
Kettles & Ware.
Aug. 22nd, 1901.

80 H. W. Rogers & Bro.
To A. Eddy.

1901.
Aug. 10 For Services Assisting Sale of the following named Lots of Seed:
Lot 43—250 Bags Timothy
" 44—250 " "
" 50—250 " "
" 53—250 " Red Top
" 62—221 " Buckwheat $10.00

Received payment
Aug. 22-1901,
A. EDDY.

Chge A. Eddy.

Chicago, Aug. 15, 1901.

81 H. W. Rogers and Bros.
To H. A. Foss, Dr.
Board of Trade Weighmaster.

For weighing Timothy Seed	$11.25
750 Bags	7.
Labor 5 men	5.
Elevator Service	
	$23.25

Paid
H. A. Foss,
Per B. W. LYONS.

82 #97 Board of Trade Bldg., Chicago, Ills.
To National Storage Company, Dr.
217 First National Bank Building,
164 Dearborn Street.

Chicago, August 5th, 1901.

Public Warehousemen
of
Manufactured stocks and raw materials on the premises of the owner, for purposes of collateral security or as guarantee of delivery after purchase.
Long Distance Telephone Central 1243.
Storage charges for months of April, May, June, July & Aug., 1901

(warrants 9154-9155-9224-9227-9436) as per terms and conditions of storage warrants and contract as follows:

April $6588.32 at $.75 per $1000.00 per month	4.94
May, June, July & Aug. for additional service and risk 5 warrants 4 months at $7.50 per warrant per month	150.00
May, June, July & Aug. for cash paid Mooney & Boland Custodian	476.61
	$631.55

Endorsed: Gen'l No. 5810. U. S. District Court. In re Alex Rodgers, Bkpt. Report of Sale by 1st Nat. Bank of Chicago. Filed Sep. 13, 1901 at 12:15 o'clock P. M. T. C. MacMillan, Clerk.

83 And afterwards, to wit: on the 13th day of September A. D. 1901 there was filed in the Clerk's office in the said cause a report of sale by the First National Bank, said report being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois,

Northern Division.

In Re
Alexander Rodgers,
Bankrupt. } No. 5810

The First National Bank of Chicago Respectfully reports to the Court that under and in pursuance of the Order of Court entered herein August 5, 1901, it sold the seed which it held in pledge from said Bankrupt covered or represented by Warrants of the National Storage Company, Numbers 9426, lot No. 60; 9427, lot 61; 9425, lot 59; 9348, lot 58; 9246, lot 55; 9195, lot 47; 9244, lot 54; 9118, lot 40; 8408, lot 8; 8489, lot 25; 8928, lot 33; 8406, lot 6; 8437, lot 20, a part thereof to the Albert Dickinson Company, a part to Thomas M. Hunter and a part to the Illinois Seed Company, and realized from such sales Fifteen Thousand Eight Hundred and Twenty Two Dollars and Forty Six Cents ($15,822.46), from which has been paid and deducted the expense of sampling and brokers' charges Forty Nine Dollars and Five Cents ($49.05), leav-

ing a balance in said Bank's hands of Fifteen Thousand Seven Hundred and Seventy Three Dollars and Forty One Cents ($15,773.41), and the proper charges of the National Storage Company are also to be deducted when fixed. As to such storage charges the unpaid bill of said National Storage Company is submitted herewith, and the Court is asked to consider the same and fix the proper amount thereof. Also attached hereto and made a part hereof are

(1) General statement of sales of seed as aforesaid.

(2) Full and particular statement of the portions thereof sold respectively to the Albert Dickinson Company, Thomas M. Hunter and the Illinois Seed Company.

84 (3) Copy of voucher for the payment of charges as aforesaid.

(4) Copy of unpaid bill of the National Storage Company.

Said The First National Bank of Chicago further reports that the said sales of seed were made as promptly as possible after the entry of the order herein aforesaid and were made at the best obtainable prices in the regular course of business, and the net proceeds of said sales as aforesaid are held by said bank subject to the Order of the Court herein.

THE FIRST NATIONAL BANK OF CHICAGO
By JAS. B. FORGAN, *Prest.*

State of Illinois, } ss.
County of Cook. }

I, Richard J. Street, being duly sworn, on my oath say, that I am the Cashier of The First National Bank of Chicago, and that the foregoing report of said bank is true.

R. J. STREET

Subscribed and sworn to before me this 13 day of September A. D. 1901.

JAMES D. WOLEY
Notary Public.

[SEAL]

85 ACCOUNT ALEXANDER RODGERS
(National Storage Company Seed)
CREDIT:

1901.			
August 16,	By sale of seed under National Storage Warrants, Albert Dickinson Company.....	$ 1,621.75	
" 17,	Thomas M. Hunter.....	12,882.50	
" 19,	Illinois Seed Company.....	1,318.21	
			$ 15,822.46

DEBIT:

1901.		
August 13,	To expense, sampling, etc....	49.05
	Balance,.....	$ 15,773.41

86 THE ALBERT DICKINSON CO.,
Seed Merchants.
Offices: West Taylor St. and the River.
STATEMENT.

Car No. A. Rodgers, Chicago, Aug. 14, 1901.
Bought of 1st. Nat'l Bank.
City.

Bags	Seed	Gross	Tare	Net	Bushels	Price	
63	Alsyke	8927	63	8864		8.00	709.12
6	"	890	6	884		10.50	92.82
1	"	150	1	149		11.50	17.13
		Sweepings		37		8.00	2.96
					70 at 11 3/4		8.22
10	Clover	1370	10	1360		9.75	132.60
47	"	6726	47	6679		3.50	300.55
23	"	3447	23	3424		10.25	350.96
				67 at 14	9.38		
				4 at 13 3/4	.47		
				9 at 16	1.44		
					11.29		
				3 Cuts	.15		11.14
							1625.50
						Cartage	3.75
							1621.75

87 Chicago 1901.

First National Bank

MEMORANDUM

To Thos. M. Hunter, Dr.

Broker

410 Royal Insurance Bldg.

Memo 8 cars Timothy Seed.

Lot					
55	32682- 322	bags	32360		
8	30451- 250	"	30201		
54	29806- 250	"	29556		
6	27976- 225	"	27751		
40	31883- 250	"	31633		
33	31217- 250	"	30967		
25	31977- 250	"	31727		
20	31042- 250	"	30792		
	247034-2047		244987 lbs. Thy	5.15	12616.83
	2047 bags at 14c			286.58	
	Less 111 cuts at 5			5.55	281.03
					12897.86
	Less 1/2 Weighing				15.36
					12882.50

88 STATEMENT

Telephone Canal 341. No. 28

Chicago 8/19/01

THE ILLINOIS SEED CO.

Seed Merchants

Geo. S. Green, President.

W. S. Gilbreath, Secretary.

Bought of First Nat Bank

Date of Purchase 8/9 No. Lot 47

Bags		Net Weight	Bushels	Price		
10	Hungarian	1414		1.15	16.26	A
1	Millet	141		1.00	1.41	
340	Buckwheat	39127		1.10	430.40	
	351 Bags at 11		38.61			
	Less 40 Cuts		2.00		36.61	
					484.68	

89 STATEMENT No. 29

Telephone Canal 341

Chicago 8/19/01

THE ILLINOIS SEED CO.
Seed Merchants
Geo. S. Green, President.
W. S. Gilbreath, Secretary.

Bought of First Nat. Bank

Date of Purchase 8/9/01 No. Lot 60

Bags		Net Weight	Bushels	Price.	
25	Millet	3394		1.10	37.33
219	Hungarian	30847		1.15	354.74
	244 Bags at 11c		26.84		
	Less 10 Cuts		.50		26.34
					418.41

90 STATEMENT No. 30

Telephone Canal 341.

Chicago, Aug. 19, 1901.

THE ILLINOIS SEED CO.
Seed Merchants
Geo. S. Green, President.
W. S. Gilbreath, Secretary.

Bought of First Nat. Bank

Date of Purchase 8/9/01 No. Lot 59.

Bags		Net Weight	Bushels	Price	
250	Millet	34626		1.10	380.89
	Bags at 13 3/4	34.38			
	Less 3 Cuts	.15			34.23
					$415.12

91 COPY.

THE FIRST NATIONAL BANK OF CHICAGO

To A. Eddy

1901.

Aug. 9,	For services assisting sale of following named lots of seed:					
	Lot 54	250	bags	Timothy		
	" 55	322	"	"		
	" 40	247	"	"	(250)	
	" 8	250	"	"		
	" 25	250	"	"		
	" 33	250	"	"		
	" 6	225	"	"		
	" 20	250	"	"		
	" 50	244	"	Hungarian		
	" 59	250	"	"		
	" 61	80	"	Clover		
	" 58	70	"	Alsike		
	" 47	351	"	Buckwheat		$30.00
	Kettles & Ware's bill for sampling above seed,					19.05
						$49.05

Received pay.,
A. EDDY.

Aug. 13, 1901.

92 FIRST NATIONAL BANK
Chicago, Ills.,
To NATIONAL STORAGE COMPANY, Dr.
217 First National Bank Building,
164 Dearborn Street.

Public Warehousemen
of
Manufactured Stocks and Raw Materials on
The Premises of the Owners, for
Purposes of Collateral Security
Or as Guarantee of De-
livery after Purchase.
Long Distance Telephone Central 1243

Chicago, August 5th 1901

Storage charges for months of April May June July & Aug. 1901 (warrants 8406-8408-8437-8489-8928-9118-9195-9244-9246-9348-9425-9426-9427) as per terms and conditions of Storage Warrants and Contracts, as follows.,

April $133393.35 at $.75 per $1000.00 per month	10.05
May June July & Aug. for additional service and risk 13 warrants 4 months at $7.50 per warrant per month	390.00
May June July & Aug. cash paid Mooney & Boland Custodian	1239.20
	$1639.25

93 COPY

Chicago, Aug. 12, 1901.

A. Eddy,
A/c for First National Bank,
To Kettles & Ware, Dr.
Rooms 44–45–46 Traders Bldg.

Lot	61	8/7	Clover	80		bags,	$1.00
"	59	"	Hung.,	250		"	1.25
"	58	"	Clover	70		"	.75
"	55	"	Timothy,	322		"	1.50
"	47	"	Buckwheat	340	351	"	1.75
"	"	"	Hung.	10			
"	"	"	Millet	1			
"	54	"	Timothy	250		"	1.25
"	40	"	"	"		"	1.25
"	8	"	"	"		"	1.25
"	25	"	"	"		"	1.25
"	6	"	"	"		"	1.25
"	20	"	"	"		"	1.25
"	33	"	"	"		"	1.25
"	60	"	Hung.	244		"	1.25
							$16.25
Two men labor and moving bags 7 hours at 20 cents an hour,							2.80
							$19.05

Paid

KETTLES & WARE
Aug. 12th, 1901.

Endorsed: 5810 U. S. District Court In Re Alex. Rodgers, Bankrupt Report of Sale by 1st Nat Bank of Chicago Filed Sep 13 1901 at 12:15 o'clock P M. T. C. MacMillan Clerk. Orville Peckham.

94 And afterwards, to wit: on the 16th day of September, A. D. 1901 there was filed in the Clerks office in the said cause the petition of the First National Bank, said petition being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Northern Division.

In re Alexander Rodgers, Bankrupt. } No. 5810

PETITION OF THE FIRST NATIONAL BANK OF CHICAGO FOR ALLOWANCE OF CLAIM:

To the Honorable Christian C. Kohlsaat, Judge of said Court.

Your Petitioner, The First National Bank of Chicago, respectfully represents and shows unto the court that it is a corporation organized and existing under and by virtue of the laws of the United States of America and located and doing business at Chicago, in the County of Cook and State of Illinois.

Your petitioner further shows that on the 8th day of May, A. D. 1901, said Alexander Rodgers filed his petition in this court praying to be adjudged a bankrupt; that on the same day the Chicago Title and Trust Company was duly appointed Receiver for said bankrupt's estate and immediately took possession of all the property and assets of said bankrupt; that on the 10th day of May,
95 A. D. 1901, said Alexander Rodgers was duly adjudged a bankrupt under the Acts of Congress relating to bankruptcy, and on the 5th day of August A. D. 1901, a decree was entered herein discharging said Rodgers from all debts provable against his estate under said Bankrupt Acts.

Your petitioner further says that said Rodgers on the 8th day of May, A. D. 1901, and for a number of years prior thereto was engaged in the business of buying and selling seeds in Chicago, Illinois, and that while conducting said business said Rodgers became justly and truly indebted to your petitioner, The First National Bank of Chicago, for money borrowed evidenced as follows:

To money due on one note for $2300.00, signed by said Rodgers, dated November 1, 1900, and payable on demand to the order of The

First National Bank of Chicago, with interest at the rate of six per centum per annum after date, on which note appears a credit of $1700.00 paid May 7, 1901.

To money due on one note for $3500.00, signed by said Rodgers, dated December 24, 1900, and payable on demand to the order of The First National Bank of Chicago, with interest at the rate of six per cent per annum after date on which note appears a credit of $1296.82, paid May 8, 1901.

To money due on one note for $2500.00, signed by said Rodgers, dated January 5, 1901, and payable on demand to the order of The First National Bank of Chicago, with interest at the rate of six per cent per annum after date.

96 To money due on one note for $4500.00, signed by said Rodgers, dated January 21, 1901, and payable on demand to the order of The First National Bank of Chicago, with interest at the rate of six per cent per annum after date.

To money due on one note for $1200.00, signed by said Rodgers dated February 27, 1901, and payable on demand to the order of The First National Bank of Chicago, with interest at the rate of six per cent per annum after date.

To money due on one note for $1200.00, signed by said Rodgers, dated March 14, 1901, payable on demand to the order of The First National Bank of Chicago, with interest at the rate of six per cent per annum after date.

Copies of all of said notes are hereto attached and made a part hereof. The original notes your petitioner is at all times ready to produce in open court; that said bankrupt was at and before the filing of said petition in bankruptcy justly and truly indebted to your petitioner, The First National Bank of Chicago, on account of said notes in the sum of Eleven Thousand Nine Hundred and fifty-three dollars and eighteen cents ($11,953.18) and interest according to the tenor and effect of said notes; that no part of said indebtedness has been paid except the sum of Two thousand and Ninety-nine dollars and three cents ($2,099.03), being the proceeds of the sale of certain collateral security as hereinafter set forth, the payment of which has left now due to your petitioner from said bankrupt the sum of Nine Thousand eight hundred and

97 fifty-four dollars and fifteen cents ($9,854.15), and that there are no off-sets or counter-claims to the same.

Your petitioner further shows that as the only security for said indebtedness it received from said Rodgers fifteen (15) certain Warehouse Receipts for the following seed, towit:

80	bushels	of	Clover,
2,519	"	"	Timothy,
351	"	"	Buckwheat,
494	"	"	Hungarian,
70	"	"	Alsike
Making a Total of 3,514	"		

Thirteen (13) of said receipts for 3,039 bushels, issued by the National Storage Company, one (1) receipt for 236 bushels issued by the Sibley Warehouse & Storage Company, and one receipt for 239 bushels, issued by the Chicago Dock Company.

An itemized statement of said indebtedness and said collateral is hereto attached and made a part hereof, marked "Exhibit A."

Your petitioner further says that on the 24th day of May, A. D. 1901, it sold to the Albert Dickinson Company in the regular course of business and at the best price then obtainable therefor all the seed evidenced by the said Warehouse Receipts of the said Sibley Warehouse and Storage Company and the said Chicago Dock Company, and received as the net proceeds of said sale the sum of Two Thousand and ninety-nine dollars and three cents ($2,099.03), an itemized statement of which sale is hereto attached and made a part hereof, marked: "Exhibit B."

98 Your petitioner further shows that on the 13th day of May A. D. 1901, said Receiver filed its petition in this court, asking for leave to sell the property (with other property) evidenced by the said thirteen (13) Warehouse Receipts of the National Storage Company held by The First National Bank of Chicago as aforesaid; that on the 5th day of August, A. D. 1901, an order was entered herein directing The First National Bank of Chicago to sell the said seed referred to in said Receiver's petition; a copy of which order is hereto attached and made a part hereof, marked: "Exhibit C"; that on the 13th day of September A. D. 1901, said The First National Bank of Chicago filed herein its report showing that it holds subject to the order of this court the sum of Fifteen Thousand seven hundred and seventy-three dollars and forty-one cents ($15,773.41), as the net proceeds of the sale of that certain property evidenced by said thirteen (13) Warehouse Receipts of the National Storage Company.

Your petitioner further represents and shows to the court that said fifteen (15) Warehouse Receipts were all duly endorsed by said bankrupt and pledged with your petitioner as aforesaid for moneys in good faith loaned and advanced by your petitioner to said bank-

rupt at the times respectively of the pledging of said receipts; and by virtue thereof your petitioner claims an equitable lien on the said fund of Fifteen Thousand seven hundred and seventy-three and forty-one one-hundredths dollars ($15,773.41) (prior to all other liens) to the amount of your petitioner's said claim.

99 Your petitioner prays that its said claim may be be allowed and that the same may be satisfied and paid out of the moneys now on deposit in The First National Bank of Chicago aforesaid.

And your petitioner will ever pray.

THE FIRST NATIONAL BANK OF CHICAGO
By JAS. B. FORGAN, *Pt.*

State of Illinois }
County of Cook } ss

Richard J. Street, being duly sworn, says that he is the Cashier of The First National Bank of Chicago; that he has read the foregoing petition signed by said bank and that the same is true in substance and in fact.

R. J. STREET, *Treas.*

Subscribed and sworn to before me this 13th day of September, A. D. 1901.

JAMES D. WOLEY,
[SEAL] *Notary Public.*

100 One 40c Revenue Stamp 3480 $2300.00
" 4c " "
" 2c " "

Chicago Nov. 1st, 1900

On demand after date I promise to pay to the order of the First National Bank of Chicago at their office

Two Thousand Three hundred Dollars

for value received, with interest at the rate of 6% per cent. per annum, after date, having deposited with said Bank as collateral security, for payment of this or any other liability or liabilities of me to said Bank, due or to become due, or that may be hereafter contracted or existing, howsoever acquired by said Bank, the following property, viz:

WARE HOUSE RECEIPTS

The market value of which is now $2877.00; with the right to call for additional security should the same decline; and on failure to respond, this obligation shall be deemed to be due and payable on demand, with full power and authority to sell and assign and deliver the whole of said property, or any part thereof, or any substi-

tute therefor, or any additions thereto, at any Brokers' Board, or at public or private sale, at the option of said Bank, or its assigns, and with the right to be purchasers themselves at such Brokers' Board, or public sale, on the non-performance of this promise, or the non-payment of any of the liabilities above mentioned, or at any time or times thereafter, without advertisement or notice. And after deducing all legal or other costs and expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales so to be made, to pay any, either or all of said liabilities, as said Bank, or its President or Cashier shall deem proper, returning the overplus to the undersigned. In case of the insolvency of the undersigned, any indebtedness due from the legal holder hereof to the undersigned may be appropriated and applied hereon at any time, as well before as after the maturity hereof.

ALEX RODGERS

Endorsed on back:
Int. ch'g'd to Nov. 30, 1900
Int. ch'g'd to Dec. 31, 1900
Int. ch'g'd to Jan. 31, 1901
Int. ch'g'd to Feb. 28, 1901
Int. ch'g'd to Mar. 31, 1901
Int. ch'g'd to Apr. 30, 1901
Paid 5/7/01 $1700.

101 7621

One 50c Revenue Stamp
Two 10c " "

$3500.00

Chicago Dec. 24th, 1900

On demand after date I promise to pay to the order of the First National Bank of Chicago at their office

Thirty-five hundred Dollars

for value received, with interest at the rate of 6% per cent. per annum, after date, having deposited with said Bank as collateral security, for payment of this or any other liability or liabilities of to said Bank, due or to become due, or that may be hereafter contracted or existing, howsoever acquired by said Bank, the following property, viz:

WARE HOUSE RECEIPTS

The market value of which is now $4196.93/100; with the right to call for additional security should the same decline; and on failure to respond, this obligation shall be deemed to be due and payable on demand, with full power and authority to sell and assign and de-

liver the whole of said property, or any part thereof, or any substitute therefor, or any additions thereto, at any Brokers' Board, or at public or private sale, at the option of said Bank, or its assigns, and with the right to be purchasers themselves at such Brokers' Board, or public sale, on the non-performance of this promise, or the non-payment of any of the liabilities above mentioned, or at any time or times thereafter, without advertisement or notice. And after deducing all legal or other costs and expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales so to be made, to pay any, either or all of said liabilities, as said Bank, or its President or Cashier shall deem proper, returning the overplus to the undersigned. In case of the insolvency of the undersigned, any indebtedness due from the legal holder hereof to the undersigned may be appropriated and applied hereon at any time, as well before as after the maturity hereof.

ALEX RODGERS

Endorsed on back:
Int. ch'g'd to Dec. 31, 1900
Int. ch'g'd to Jan. 31, 1901
Int. ch'g'd to Feb. 28, 1901
Int. ch'g'd to Mar. 31, 1901
Int. ch'g'd to Apr. 30, 1901
Paid 5/8/01 $1296.82 Chge 7.

102 8594

44) Two 10c Revenue Stamps
One 25c " "
" 1c " "

$2250.00/100
Chicago Jan. 5, 1901

On demand after date I promise to pay to the order of the First National Bank of Chicago at their office
Twenty-two Hundred Fifty and 00/100 Dollars,
for value received, with interest at the rate of 6% per cent. per annum, after date, having deposited with said Bank as collateral security, for payment of this or any other liability or liabilities of mine to said Bank, due or to become due, or that may be hereafter contracted or existing, howsoever acquired by said Bank, the following property, viz:

500 Bags Timothy Seed secured by Ware House Receipts

The market value of which is now $2750.00; with the right to call for additional security should the same decline; and on failure to respond, this obligation shall be deemed to be due and payable

on demand, with full power and authority to sell and assign and deliver the whole of said property, or any part thereof, or any substitute therefor, or any additions thereto, at any Brokers' Board, or at public or private sale, at the option of said Bank, or its assigns, and with the right to be purchasers themselves at such Brokers' Board, or public sale, on the non-performance of this promise, or the non-payment of any of the liabilities above mentioned, or at any time or times thereafter, without advertisement or notice. And after deducing all legal or other costs and expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales so to be made, to pay any, either or all of said liabilities, as said Bank, or its President or Cashier shall deem proper, returning the overplus to the undersigned. In case of the insolvency of the undersigned, any indebtedness due from the legal holder hereof to the undersigned may be appropriated and applied hereon at any time, as well before as after the maturity hereof.

ALEX RODGERS

Endorsed on back:
Int ch'g'd to Jan 31 1901
Int ch'g'd to Feb 28 1901
Int ch'g'd to Mar 31 1901
Int ch'g'd to Apr 30 1901

103 45) 9749

One 50c Revenue Stamp
" 40c " "

$4500.00/100

Chicago Jan 21 - 1901

On demand after date I promise to pay to the order of the First National Bank of Chicago at their office

Forty Five Hundred Dollars,

for value received, with interest at the rate of 6% per cent. per annum, after date, having deposited with said Bank as collateral security, for payment of this or any other liability or liabilities of mine to said Bank, due or to become due, or that may be hereafter contracted or existing, howsoever acquired by said Bank, the following property, viz:

WARE HOUSE RECEIPTS

The market value of which is now $5500.00/100; with the right to call for additional security should the same decline; and on failure to respond, this obligation shall be deemed to be due and payable on demand, with full power and authority to sell and assign and de-

liver the whole of said property, or any part thereof, or any substitute therefor, or any additions thereto, at any Brokers' Board, or at public or private sale, at the option of said Bank, or its assigns, and with the right to be purchasers themselves at such Brokers' Board, or public sale, on the non-performance of this promise, or the non-payment of any of the liabilities above mentioned, or at any time or times thereafter, without advertisement or notice. And after deducing all legal or other costs and expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales so to be made, to pay any, either or all of said liabilities, as said Bank, or its President or Cashier shall deem proper, returning the overplus to the undersigned. In case of the insolvency of the undersigned, any indebtedness due from the legal holder hereof to the undersigned may be appropriated and applied hereon at any time, as well before as after the maturity hereof.

ALEX RODGERS

Endorsed on back:
Int ch'g'd to Jan 31, 1901
Int ch'g'd to Feb 28 1901
Int ch'g'd to Mar 31 1901
Int ch'g'd to Apr 30 1901

104 12766

25c Revenue Stamp

$1200.00

Chicago Feby 27 - 1901

On demand after date I promise to pay to the order of the First National Bank of Chicago at their office

Twelve Hundred and 00/100 Dollars

for value received, with interest at the rate of 6% per cent. per annum, after date, having deposited with said Bank as collateral security, for payment of this or any other liability or liabilities of mine to said Bank, due or to become due, or that may be hereafter contracted or existing, howsoever acquired by said Bank, the following property, viz:

WARE HOUSE RECEIPTS

The market value of which is now $1500 00/100; with the right to call for additional security should the same decline; and on failure to respond, this obligation shall be deemed to be due and payable on demand, with full power and authority to sell and assign and deliver the whole of said property, or any part thereof, or any substitute therefor, or any additions thereto, at any Brokers' Board, or

at public or private sale, at the option of said Bank, or its assigns, and with the right to be purchasers themselves at such Brokers' Board, or public sale, on the non-performance of this promise, or the non-payment of any of the liabilities above mentioned, or at any time or times thereafter, without advertisement or notice. And after deducing all legal or other costs and expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales so to be made, to pay any, either or all of said liabilities, as said Bank, or its President or Cashier shall deem proper, returning the overplus to the undersigned. In case of the insolvency of the undersigned, any indebtedness due from the legal holder hereof to the undersigned may be appropriated and applied hereon at any time, as well before as after the maturity hereof.

ALEX RODGERS

#47
Endorsed on back:
Int ch'g'd to Mar 31 1901
Int ch'g'd to Apr 30 1901

105 #48 14142

$1200 00/100

Chicago March 14th 1901

On demand after date I promise to pay to the order of the First National Bank of Chicago at their office

Twelve Hundred Dollars,

for value received, with interest at the rate of 6% per cent. per annum, after date, having deposited with said Bank as collateral security, for payment of this or any other liability or liabilities of mine to said Bank, due or to become due, or that may be hereafter contracted or existing, howsoever acquired by said Bank, the following property, viz:

WARE HOUSE RECEIPTS

The market value of which is now $1400 00/100; with the right to call for additional security should the same decline; and on failure to respond, this obligation shall be deemed to be due and payable on demand, with full power and authority to sell and assign and deliver the whole of said property, or any part thereof, or any substitute therefor, or any additions thereto, at any Brokers' Board, or at public or private sale, at the option of said Bank, or its assigns, and with the right to be purchasers themselves at such Brokers' Board, or public sale, on the non-performance of this promise, or the non-payment of any of the liabilities above mentioned, or at any time or times thereafter, without advertisement or notice. And af-

ter deducing all legal or other costs and expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales so to be made, to pay any, either or all of said liabilities, as said Bank, or its President or Cashier shall deem proper, returning the overplus to the undersigned. In case of the insolvency of the undersigned, any indebtedness due from the legal holder hereof to the undersigned may be appropriated and applied hereon at any time, as well before as after the maturity hereof.

ALEX RODGERS

Endorsed on back:
2 Ten cent Revenue Stamps
2 Two " " "
Int ch'g'd to Mar 31 1901
Int ch'g'd to Apr 30 1901

106 "EXHIBIT A."

Estate of Alexander Rodgers, Bankrupt,
To The First National Bank of Chicago, Debtor.

To balance due on one note for	$2300.00,	
signed by said bankrupt, dated		
November 1, 1900, on which		
appears a credit of	1700.00,	
paid May 7, 1901		$600.00
To balance due on one note for	$3500.00,	
signed by said bankrupt, dated		
December 24, 1900, on which		
appears a credit of	$1296.82	
paid May 8, 1901,		$2,203.18
To balance due on one note for	$2,250.00,	
signed by said Rodgers, and dated		
January 5, 1901,		$2,250.00
To balance due on one note for	$4500.00,	
signed by said Rodgers, dated		
January 21, 1901,		$4,500.00
To balance due on one note for	$1200.00,	
signed by said Rodgers,		
dated February 27, 1901		$1,200.00
To balance due on one note	$1,200.00	
signed by said Rodgers,		
dated March 14, 1901		$1,200.00
	Total	$11,953.18

May 24, 1901, paid on account of proceeds of sale of seed to Albert Dickinson Company, evidenced by receipt of the Sibley Warehouse & Storage Co. and receipt of the Chicago Dock Co., $2,099.03

Balance, $9,854.15

The only security for the above indebtedness are the following Warehouse Receipts:

13 receipts of the National Storage Company as follows:—

Receipt No.	9426	Lot No.	60	244	bags	Hungarian seed.
" "	9427	" "	61	80	"	Clover.
" "	9425	" "	59	250	"	Hungarian "
" "	9348	" "	58	70	"	Alsike.

(Exhibit A. #2)

107 Receipt No.	9246	Lot No.	50	322	bags	of	Timothy
" "	9195	" "	47	351	"	"	Buckwheat.
" "	9244	" "	54	250	"	"	Timothy.
" "	9118	" "	40	247	"	"	"
" "	8408	" "	8	250	"	"	"
" "	8489	" "	25	250	"	"	"
" "	8928	" "	33	250	"	"	"
" "	8406	" "	6	225	"	"	"
" "	8437	" "	20	250	"	"	"

One Receipt issued by the Sibley Warehouse & Storage Company:
Receipt No. 6402 236 bags of Timothy.
One Receipt issued by the Chicago Dock Company:
Receipt No. 6705 239 bags of Timothy.

108 "EXHIBIT B."

The Albert Dickinson Company

Chicago, May 24, 1901.

Bought of C. A. Heath
a/c Whom it May Concern.

Mark	Bags						
T66745	236	Timothy	30146	236	29910	3.45	1031.89
		Less commission,					7.73
							1024.16
		Less storage 4 mos at 1½					14.16
							1010.00
	136 at 13			17.68			
	100 at 14			14.00			
				31.68			
	3 cuts,			.15			31.53
							1041.53
					Cartage		4.72
							1036.81
			DUPLICATE.				
R NI	239	Timothy	30528	239	30289	3.45	1044.97
		Less commission,					7.84
							1037.13
		Less storage 2 mos. at 2 & 1½					8.37
							1028.76
	239 at 14						33.46
							1062.22

DUPLICATE

109 "EXHIBIT C."

In re 5810
Alexander Rodgers,
Bankrupt.

The Court:

"All objections filed before referee to stand as exceptions to referee's report here.

It appearing to the Court that now is the best time to sell the seed in question, all parties being in open Court on the stipulation of Mr. Peckham that The First National Bank will hold the funds received from the sale of the seed in question subject to the order of this court.

Ordered That The First National Bank have leave to proceed at once to sell the seed at the best price obtainable in the regular course of business, and make report to the court of its proceedings. Exceptions to report as to jurisdiction of this court sustained, court finds that it has jurisdiction. National Storage Company and James A. Patton except."

110 Endorsed: 5810 U. S Dist. Court In Re Estate Alex. Rodgers, Bkt Petition of 1st Nat Bank of Chicago for allowance of its claim Filed Sept 16 1901 at 10 o'clock A M T C MacMillan, Clerk. Orville Peckham.

111 And afterwards, to wit, on the 23rd day of September, A. D. 1901 there was filed in the Clerk's Office of said Court in the above entitled cause, a Petition of H. W. Rodgers, et al, said petition being in the words and figures following, to wit:

112 United States of America
Northern District of Illinois } ss.

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Northern Division.

In the matter of
Alexander Rodgers,
bankrupt } No. 5810

To the Honorable Christian C. Kohlsaat, judge of said court, In Bankruptcy sitting:—

Your petitioners Henry W. Rogers and James C. Rogers respectfully show unto your Honor that heretofore, to-wit: on the 8th day of May A. D. 1901 Alexander Rodgers filed his petition to be adjudged a bankrupt and that afterwards he was duly adjudicated a bankrupt and that the Chicago Title and Trust Company was appointed receiver and qualified as such and afterwards was elected and appointed trustee and qualified as such and that on the 13th day of May the said receiver filed its petition to be allowed to sell certain property which it alleged had come to its possession and which it also alleged belonged to said bankrupt. That your petitioners were made parties defendant to said petition and that they appeared and filed an answer herein and that afterwards such proceedings were had in that behalf that on the 5th day of August A. D. 1901 an order was made and entered by this honorable court that the First National Bank should be and was ordered to proceed and sell certain seed held by it and with the consent of these petitioners that it should also sell certain seeds held by these petitioners as hereinafter stated and set forth and that it should report its doings in the premises to the court.

113 Your petitioners further show unto your Honor that on the 20th day of February A. D. 1901 they as partners doing business under the name of H. W. Rodgers & Bro. made a loan to the said Alexander Rodgers of five thousand dollars ($5000) and to evidence said loan they took the promissory note of said Rodgers dated on that day, in and by which the said Rodgers promised to pay to the order of your petitioners five thousand dollars ($5000) on demand with interest at the rate of five per cent per annum, all of which will more surely appear from the said note ready to be

produced or from a copy thereof which is hereto attached marked Exhibit "A" and prayed to be taken as a part hereof.

Your petitioners further show unto your Honor that to secure the payment of said sum the said Rodgers agreed to deliver to and deposit with your petitioners warehouse receipts for seed, which receipts should aggregate and be of the value of about six thousand dollars ($6000) and that as a matter of fact, at the time of the delivery of said note the said Rodgers put in the hands of your petitioners certain warehouse receipts for seed and that at the request of said Rodgers, your petitioners have allowed him to change the said receipts as he had purchasers for the seed that was covered by certain warehouse receipts which were originally deposited and that in all cases when a warehouse receipt was surrendered, another warehouse receipt of similar character was delivered to your petitioners and that prior to and at the time of the petition in bankruptcy being filed herein, your petitioners held as security for said promissory note, the following warehouse receipts issued by the National Storage Company as follows:—

Warehouse receipt number 9154 for 250 bags timothy seed said to weigh 30549 pounds, lot number 43 contained in division B, section 4, fifth floor at its warehouse premises number 281 located 114 at number 220 to 230 Johnson street, Chicago, Illinois, dated January 5, 1901.

Also warehouse receipt number 9155 for 250 bags timothy seed, said to weigh 30421 pounds, lot number 44 contained in division B, section 5, fifth floor in the same warehouse, dated January 5, 1901.

Also number 9224 for 250 bags timothy seed, said to weigh 31892 pounds, lot number 50 contained in division B, section 30, fifth floor, same warehouse, dated February 19, 1901.

Also number 9227 for 250 bags red top seed, said to weigh 24969 pounds, lot number 53 contained in division B, section 7, fifth floor, same warehouse, dated February 19, 1901.

Also number 9436 for 221 bags buckwheat seed, said to weigh 26815 pounds, lot number 62 contained in division B, section 19, fifth floor, same warehouse, dated May 7, 1901.

That all said warehouse receipts were issued to the said Alexander Rodgers and were by him duly endorsed and delivered to your petitioners before any proceedings were taken; all of which will more surely appear from the said warehouse receipts ready to be produced as this honorable court shall direct.

Your petitioners further show unto your Honor on information and belief and therefore they charge the fact to be that at the time of the issuing of said several warehouse receipts or storage warrants,

the several lots of seed represented thereby were in the actual physical possession of the said National Storage Company and that the said property continued in the possession of said company in premises leased and controlled by said company at the time of the filing of the petition in bankruptcy herein and that the only interest the bankrupt had in said seed was in the equity or balance
115 thereof remaining after the payment of said note held by your petitioners and that the receiver and trustee in bankruptcy succeeded to the rights of said bankrupt and acquired no greater interest in said seed than he possessed at the time of filing his petition.

Your petitioners further show unto your Honor that all these facts were set up in their answer to the petition of the receiver herein and your petitioners in said answer questioned the jurisdiction of this honorable court to hear and determine the said matter in a summary manner. That the said petition and the answers thereto were referred to Honorable Sidney C. Eastman, referee in bankruptcy and a large amount of testimony was taken and said note and storage warrants were introduced in evidence and that thereupon on the hearing of exceptions to the report of said referee, this honorable court made the order hereinabove referred to and that upon the making of said order your petitioners surrendered to the First National Bank the said storage warrants and permitted it to make sale of said seed and that it has made sale of said seed and prepared its report of said sale from which it appears that all the said seed was sold and that it realized a net amount of $7230.43 which is in the hands of said bank, subject to the order of this honorable court in the premises; all of which will more surely appear from the said report to be filed herein, to which reference is hereby made; and your petitioners charge that they are entitled to have the amount of the principal and interest of said note paid out of said proceeds to the exclusion of any other creditors of said bankrupt.

Your petitioners therefore ask the aid of this honorable court in the premises and pray that the Chicago Title & Trust Company, trustee of said bankrupt, may be required to show cause if any it has why an order should not be entered herein directing the payment to your petitioners of the amount of said note, principal and interest, according to the terms thereof, out of the proceeds of the
116 sale of said seed; that such order and all necessary and proper orders may be entered and that your petitioners may have such other or further or different relief in the premises as the nature of their case may require and as to equity shall seem meet.

That the said trustee may be required to answer the premises but not under oath, its answer under oath being hereby waived and that a rule may be entered herein requiring such answer within a short

day to be fixed by the court; and your petitioners will ever pray etc.

HENRY W ROGERS
By JAS C ROGERS
JAMES C ROGERS

State of Illinois } ss.
County of Cook }

James C. Rogers being first duly sworn, on oath states that the foregoing petition by him subscribed is true of deponent's own knowledge except as to the matters and things which are therein stated to be upon information and belief and that as to those matters he believes it to be true.

JAMES C ROGERS

Subscribed and sworn to before me this 4th day of September A. D. 1901.

LAURA E THOMPSON
Notary Public.

[SEAL.]

117 EXHIBIT "A".

$5000 Chicago Feby 20, 1901

On demand after date I promise to pay to the order of H. W. Rogers & Bro. five thousand dollars at their office, value received with interest at the rate of five per cent per annum.

ALEX RODGERS

(Revenue stamp)
(1 cancelled.)

Endorsed: In Bankruptcy No. 5810. In the District Court of the United States, Northern District of Illinois. In the matter of Alexander Rodgers, Bankrupt. Petition of H. W. Rodgers et al for payment of note. Filed Sept. 23, 1901 at 10 o'clock A. M. T. C. MacMillan, Clerk. Kerr & Kerr, 189 La Salle St., Solrs. for Rogers and Bro.

118 And afterwards, to wit: on the 23rd day of September, A. D. 1901, the following order was had and entered of record in said cause, before the Hon. Christian C. Kohlsaat, Judge, to wit:

In re
5810 Alexander Rodgers,
Bankrupt.

Now coming on to be heard the motion of the First National Bank of Chicago for approval by the Court of the reports of sale of seed filed herein on September 13th inst., and all parties in interest having been duly notified of the said motion and hearing thereof, it is

Ordered by the court that the said reports of sale be and they are hereby approved and confirmed, without, however, approving or passing upon the claims and charges presented to said Bank by the National Storage Company and referred to and set forth in said reports, which said claims and charges are reserved for the further consideration of the Court.

And the First National Bank and H. W. Rogers and Brothers having filed herein their several petitions claiming preference and liens on the proceeds of sale of seed reported by said Bank and that they have valid claims against the said bankrupt that should be first paid out of the said proceeds of sale before other creditors, it is

Ordered that the trustee of said bankrupt estate and any parties in interest file their answers to the said petitions within ten days from this date. It is further

Ordered that the National Storage Co., and any other parties having claims be and they are hereby ruled to present the same within ten days from notice.

119 And afterwards, to wit, on the 1st day of October, A. D. 1901, there was filed in the Clerk's Office of said Court in the above entitled cause, an Answer of J. A. Patten and E. W. Bailey & Co., to Petition of H. W. Rogers & Brother; said Answer being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Northern Division.

In re
Alexander Rodgers,
Bankrupt. } No. 5810.

The Joint and Several Answer of James A. Patten and E. W. Bailey & Co., Creditors, to the petition of H. W. Rogers & Bro., Petitioner.

And now come James A. Patten, a creditor of said Alexander Rodgers, Bankrupt, to the extent of about Thirty-four thousand dollars, and E. W. Bailey & Co., a creditor for more than two hundred dollars, said creditors holding a majority in amount of the claim against said bankrupt, by Joseph E. Paden, their Attorney, and without waiving any rights as to the insufficiency of said petition, and not admitting any of the allegations thereof, except as to such matters as are of record in this cause, for answer thereto say that said petitioner is not entitled to the relief prayed for in such petition for the following reasons, among others:—

1. The so-called storage warrants or warehouse receipts of the National Storage Company referred to in said petition are fraudulent and void and are not sufficient in law to pass any legal or equitable title to, or lien upon the property therein described to the holder thereof.

120 2. Neither the National Storage Company or H. W. Rogers & Bro. ever had any possession of the property described in the so-called storage warrants or warehouse receipts mentioned in said petition in consequence of which said property was never legally or equitably pledged to said petitioner.

3. The property described in the so-called storage warrants or warehouse receipts was not in the possession of either the Bankrupt or the National Storage Company or H. W. Rogers & Bro. at the time the notes described in the petition were executed and delivered to the petitioner.

4. The property described in said so-called storage warrants or warehouse receipts were suffered by the National Storage Company and H. W. Rogers & Bro. to remain in the possession, car[illegible]nd control of said Bankrupt and was sold by the said Bankrupt [illegible]fore the time of the failure, and was delivered to other parties before that time.

5. The scheme of issuing the so-called storage warrants or warehouse receipts by said National Storage Company and said Bankrupt was a mere fiction and a sham as to the possession of the property and was a subterfuge to evade the chattel mortgage laws of the State of Illinois and was and is a fraud in law.

6. The property for which the alleged storage warrants or warehouse receipts were given was not in the possession of the Bankrupt at the time of the bankruptcy and was never in the possession of the National Storage Company. They were not issued for the seed the petitioner has sold, hence can give petitioner no lien on property for which they were not issued.

7. H. W. Rogers & Bro. has not filed any claim against the es-

tate of the Bankrupt and is not a creditor to the extent named in
01. the said petition.

8. H. W. Rogers & Bro. received payments from said Bank-
121 rupt within from months before the adjudication in bankruptcy which it has not returned before the filing of its petition herein.

And these respondents, having answered said petition therefore deny that said petitioner is entitled to the relief prayed for, and deny that it has any equitable or legal lien on the funds now in the hands of the First National Bank of Chicago and ask that said petition be dismissed and that said First National Bank be directed to pay over to the trsutee in this cause, all moneys now in its hands to abide the orders of this Court.

JAMES A. PATTEN,
E. W. BAILEY & Co.,
By JOSEPH E. PADEN,
their Attorney.

(Endorsed) 5810. In re Rodgers, Bankrupt. Answer of J. A. Patten and E. W. Bailey & Co. to Petition of H. W. Rogers & Bro. Filed Oct. 1, 1901 at 4:40 o'clock P. M. T. C. MacMillan, Clerk. J. E. Paden.

122 And afterwards, to wit: on the 1st day of October, 1901, there was filed in said cause the answer of J. A. Patten et al to the petition of the First National Bank, said answer being in the words and figures following to wit:

IN THE DISTRICT COURT OF THE UNITED STATES

for the Northern Division of Illinois,

Northern Division.

In re
Alexander Rodgers
Bankrupt } No. 5810.

The joint and several answer of James A. Patten and E. W. Bailey & Co., creditors, to the petition of the First National Bank of Chicago, Petitioner.

And now come James A. Patten, a creditor of said Alexander Rodgers, bankrupt, to the extent of about Thirty-four thousand dol-

lars, and E. W. Bailey & Co., a creditor for more than two hundred dollars, said creditors holding a majority in amount of the claim against said bankrupt, by Joseph E. Paden, their attorney, and without waiving any rights as to the insufficiency of said petition, and not admitting any of the allegations thereof, except as to such matters as are of record in this cause, for answer thereto say that said petitioner is not entitled to the relief prayed for in such petition for the following reasons, among others:

1. The so-called storage warrants or warehouse receipts of the National Storage Company referred to in said petition are fraudulent and void and are not sufficient in law to pass any legal or equitable title to or lien upon the property therein described to the holder thereof.

2. Neither the National Storage Company or the First National Bank ever had any possession of the property described in the so-called storage warrants or warehouse receipts mentioned in said petition in consequence of which said property was never legally or equitably pledged to said petitioner.

3. The property described in the so-called storage warrants or warehouse receipts was not in the possession of either the bankrupt or the National Storage Company or the First National Bank at the time the notes described in the petition were executed and delivered to the petitioner.

4. The property described in said so-called storage warrants or warehouse receipts were suffered by the National Storage Company and the First National Bank of Chicago to remain in the possession, care and control of said bankrupt and was sold by the said bankrupt before the time of the failure, and was delivered to other parties before that time.

5. The scheme of issuing the so-called storage warrants or warehouse receipts by said National Storage Company and said bankrupt was a mere fiction and a sham as to the possession of the property and was a subterfuge to evade the chattel mortgage laws of the State of Illinois and was and is a fraud in law.

6. The property for which the alleged storage warrants or warehouse receipts were given was not in the possession of the bankrupt at the time of the bankruptcy and was never in the possession of the National Storage Company. They were not issued for the seed the petitioner has sold hence can give petitioner no lien on property for which they were not issued.

7. The First National Bank has not filed any claim against the estate of the bankrupt and is not a creditor to the extent named in said petition.

8. The First National Bank received payments from said bankrupt within from months before the adjudication in bankruptcy which it has not returned before the filing of its petition herein.

And these respondents, having answered said petition therefore deny that said petitioner is entitled to the relief prayed for and deny that it has any equitable or legal lien on the funds now in its hands, and ask that said petition be dismissed and that said First National Bank of Chicago be directed to pay over to the trustee in this cause all moneys now in its hands to abide the orders of this court.

123

JAMES A. PATTEN,
E. W. BAILEY & CO.
By JOSEPH E. PADEN
Their Attorney.

(Endorsed)
#5810 In re Rodgers Bankrupt
Answer of J. A. Patten and E. W. Bailey & Co. to petition of The First National Bank of Chicago.

Filed Oct 1 1901 at 4-40 o'clock P. M. T. C. MacMillan Clerk. Jos. E. Paden Atty. for Patten & E. W. Bailey & Co.

124 And afterwards, to wit, on the 2nd day of October, A. D. 1902, there was filed in the Clerk's Office of said Court in the above entitled cause, an Answer of Trustee to petition of First National Bank; said Answer being in the words and figures following, to wit:

125 IN THE DISTRICT COURT OF THE UNITED STATES.

Northern District of Illinois.

Northern Division.

In the Matter of Alexander Rodgers, Bankrupt. } No. 5810.

Response of the Chicago Title and Trust Company, Trustee to the Petition of First National Bank of Chicago, filed herein on September 16, A. D. 1901.

The response of the Chicago Title and Trust Company, trustee, in Bankruptcy in the above cause, for answer to the said petition,

admits the allegations in said petition as to the petition of Alexander Rodgers to be adjudged a bankrupt, the adjudication in bankruptcy and the discharge of the said bankrupt, and that this respondent was on the eighth day of May, 1901, duly appointed Receiver of the said bankrupt estate, and took possession of all the property and assets of said bankrupt to be true, and this respondent further says that as such Receiver it took possession of the seed mentioned in said petition and which was in the warehouse of the said bankrupt known as 220-230 Johnson Street, Chicago, and said Receiver so received possession of said seed and took possession of the warehouse of the said bankrupt on the said eighth day of May, 1901, and so received said property and possession from the said bankrupt, his employees and agents, who delivered same to said Receiver peaceably and without any notice to said Receiver of any pledges or liens claimed upon any of the said seed in favor of any person, and said Receiver had no knowledge of any such claims or pledges until after it had fully become possessed of said property, and respondent says that said Receiver continued to hold possession of the said property until after August 5th, when the said First National Bank, under the order of this Court, sold from the said warehouse the said seed named in the said petition together with certain other seed named in the peti-
126 tion of H. W. Rogers & Bro. filed herein September 23 inst.

This respondent shows that it was elected and appointed trustee of the said bankrupt estate on July 3, 1901, and duly qualified.

As to the allegations in said petition as to the indebtedness of said bankrupt to said First National Bank, and the amount thereof, and when and how incurred, this respondent knows only from the allegations of the said petition, except from the general testimony taken before Referee Eastman on special reference as hereinafter set forth, and neither admits nor denies the said indebtedness but leaves the petitioner to make proof as it may be advised, but respondent on information and belief charges that the credits of $1700.00 of May 7 and $1296.82 of May 8, 1901, named in said petition are invalid preferences made by said bankrupt to said petitioner and should be so held; and as to the sales as shown by said petition made in May last of seed held under warrants of the Sibley Warehouse and Storage Company, and the Chicago Dock Company, respondent says as to how the proceeds of the same were applied and whether there was any balance that should be paid to the bankrupt estate, this respondent knows nothing and alleges that said petitioner should make full and strict account with said estate.

As to the so-called warehouse receipts or warrants alleged by said

petitioner to have been endorsed to and held by it at the hands of said bankrupt as pledges and collateral security for said indebtedness, this respondent denies that the same were valid receipts and liens upon or pledges of the seed referred to in said warrants, as against the rights and interests of said bankrupt estate and the general

127 creditors of said bankrupt; and respondent says that on and prior to August 31st, 1900, said Alexander Rodgers was a seed merchant, engaged in handling, buying and selling of timothy and other seed, and had as his place of business a warehouse known as 220-230 Johnson Street, Chicago, where he used and occupied the south half of the building known as aforesaid, consisting of six large open floors and a basement, without partitions dividing said floors off into bins or spaces for the separate storing of seed; and in said month of August 1900, said bankrupt entered into a contract with said National Storage Company whereby said storage company agreed to issue so-called warehouse receipts on any of the bankrupt's property in said premises on application of said bankrupt from time to time, reciting the receipt of said property and agreeing to deliver the same upon the order of the said bankrupt, and that for the warrants so issued, said bankrupt should pay said storage company $7.50 for $10,000.00 estimated value of property, and 75 cents for each additional $1,000.00 worth of property per month, payable each quarter-yearly, and said bankrupt also executed and delivered a formal lease of all the said premises occupied by him to said storage company for a nominal consideration, but respondent alleges that after said contract and lease were made said bankrupt continued fully possessed of the said premises in carrying on his said business therein the same as he had done theretofore and continued to pay the rent for said premises to the owner of said building under lease to said bankrupt, and the said storage company never had any possession or control of the said premises, or any part thereof, nor paid any rent therefor, and had no possession or control of the seed in said warehouse at any time, but the same was always under the control of said bankrupt as his own property.

128 This respondent further alleges that on and after August 31, 1900, on the applications of the said bankrupt from time to time said National Storage Company issued its so-called warrants or receipts for various lots of seed in said warehouse of said bankrupt and delivered the same to him, which receipts include all those named in said petition, but respondent alleges said Storage Company had no possession and exercised no control over said seed called for in said alleged receipt, and that the issuance of said so-called receipts and any disposition thereof were unknown to the rest of the creditors of said bankrupt.

And this respondent alleges that said bankrupt in the regular conduct of his business up to May 8th, 1901, continued to exercise full control over all said seed at his said warehouse, removing, selling and shipping out such of said lots as he chose from time to time, and when he had disposed of a lot or pile of seed for which said prtitioner held a so-called receipt as aforesaid, said bankrupt would either pay said petitioner the indebtedness alleged to be secured by such receipt or make other arrangement by which he took up such receipt, or in some cases he would replace such lot of seed so removed by other seed of substantially the like grade and
129 quantity, and this respondent alleges that the original seed called for under so called warrants 9425, 9118, 8489 and 8406 was removed by said bankrupt within four months prior to the proceedings in bankruptcy herein and other seed substituted in place thereof so that the seed which was in said warehouse and was a part of said seed sold by said petitioner under said order of Court was not the seed originally called for by said so called receipts and as to the said so called receipts, and also numbers 9426, 9427, 9348 8928 and 8437, respondent alleges on information and belief and charges the fact to be that some of said receipts took the place of other like receipts of said storage company which had theretofore been held by said petitioner under which other receipts the seed called for therein had been removed and different seed substituted one or more times, and the seed called for in the rest of said alleged receipts has been removed and replaced by other seed since said receipts were held by said petitioner, so that the seed in all such cases of substitution went into the hands of said Receiver and was sold by said bank under said order of Court and was other and different seed than that alleged to have been taken by said bank as collateral, and said removals of seed were made by said bankrupt in the regular course of his business, and in other respects all of said so called receipts were irregular and insufficient as and when taken by said bank to constitute a lien upon or pledge of said seed as against the rights of the general creditors of said bankrupt, and some of said so called receipts were taken by said bank within four months prior to said bankruptcy proceedings and without any advancement or loan to said bankrupt made at the time, whereby said alleged pledges or liens were illegal preferences under the bankruptcy law therefore respondent calls for strict proof on the part of said bank as to all said alleged liens or pledges. And respondent alleges said National Storage Company had no storage warehouse at the said premises of said bankrupt and was not a warehouseman.

130 This respondent admits that said Receiver filed his petition in this Court on May 13th last, praying for leave to sell, with other property, the seed of the said bankrupt, including the seed claimed by said petitioner and said H. W. Rogers & Bro. to be held by them in pledge under said so-called warrants as security for indebtedness of said bankrupt to them respectively, and respondent alleges that said bank and H. W. Rogers & Bro. and said National Storage Company appeared and filed their objections to the jurisdiction of this Court, and set up the said alleged liens and claims under said warrants which are now set up in said petitions of said First National Bank and H. W. Rogers & Bro., and claimed that the actual posession and control of all said seed called for in said warrants was held by said storage company for the benefit of said bank and said Rogers & Bro. under said warrants, and the Court made special reference of the said petition of the Receiver and said answers of said bank and said Rogers & Bro. and the answers of certain other creditors in interest, to the Honorable Sidney C. Eastman, referee in Bankruptcy, to take evidence of the respective parties and to report the same and his conclusions in the premises to this Court, and under said reference, a large amount of testimony was taken, and said referee made a report, wherein said referee 131 found that the said receiver had not at the date of the filing of the petition of said bankrupt and the adjudication, and has not, possession or right of possession of said property, and that the National Storage Company was at the date of the appointment of the Receiver in the possession of the said property and of the premises in which the property was stored under its lease from the said bankrupt, and had been so continuously in the possession from August 31st, 1900, and that it was entitled to the possession of the said premises and property; and said report recommended that an order be entered in the cause, finding that the receiver had not the possession or the right of possession of the property set forth in said answers of said storage company, said bank and said Rogers & Bro., and that said storage company was at the date of the filing of the petition in bankruptcy entitled to and is entitled to the present possession of the said property, and respondent alleges that on objections and exceptions to said report by said Receiver, and certain other creditors of said estate, this Court held that said Receiver had received the said property from the said bankrupt peaceably and without any force, and that the Court had jurisdiction over the said property, and thereupon, all parties being desirous that said seed claimed under said warrants should be at once sold under the favorable market then existing, the Court ordered that the First

National Bank sell the said seed and report to the Court, and the Court overruled the recommendations of said report as to the possession of the property and the jurisdiction of the Court, and reserved the rest of said report for future consideration.

132 And respondent says that the debts proven by the general creditors, who are unsecured, against said estate amount to upwards of $34,000.00, and said bank and H. W. Rogers & Bro. have not yet made proof of claims, and the other assets of said estate other than the proceeds of said sale made by said bank will be sufficient to pay only a small per cent of the debts proven against said estate.

Therefore this respondent says that the relief prayed by the said petitioner should be denied and said petition dismissed and the said proceeds of the said sale be turned over to the trustee in bankruptcy in said estate, etc.

THE CHICAGO TITLE AND TRUST COMPANY
Trustee
by NEWTON WYETH
its Attorney

Endorsed: 5810. U. S. Dist. Court. In re. Alex Rodgers, Bankrupt. Answer of Trustee to petition of 1st Natl. Bank. Filed Oct. 2, 1901 at 2 o'clock P. M. Newton, Wyeth, Attorney for Trustee.

133 And afterwards, to wit, on the 2nd day of October, A. D. 1901, there was filed in the Clerk's Office of said Court, in the above entitled cause, an Answer of Trustee to the petition of Rodgers & Brother; said Answer being in the words and figures following, to wit:

134 IN THE DISTRICT COURT OF THE UNITED STATES.

Northern District of Illinois.

Northern Division.

In the matter of
Alexander Rodgers,
Bankrupt. } No. 5810.

Response of the Chicago Title & Trust Company, Trustee, to the petition of H. W. Rogers & Bro., filed herein September 23, 1901.

This respondent, the Chicago Title & Trust Company, Trustee in bankruptcy in the above entitled cause, for answer to the said petition, admits as true the allegations in said petition as to the filing of the petition of Alexander Rodgers, the adjudication in bankruptcy, and that this respondent was appointed Receiver and qualified as such in said estate, and on May 13, 1901, filed its petition to be allowed to sell certain property of said bankrupt, as alleged in said petition of said Rogers & Bro. Respondent says that on May 8, 1901, it as such Receiver took possession of the property of said bankrupt, including the seed referred to in said petition of Rogers & Bro., and received possession of said seed at the warehouse of said bankrupt, at premises known as 220-230 Johnson Street, Chicago, and received said possession from the said bankrupt, his employees and agents, without any notice or knowledge of any alleged liens thereon or pledges thereof in favor of said Rogers & Bro. or any other person, and said Receiver continued to hold possession thereof until after August 5, 1901, when, pursuant to an order of Court entered herein on that date it yielded possession of the said seed, together with the seed alleged by the First Natioal Bank of Chicago, to be held by it in pledge, to said bank to be sold.

Respondent says it was selected as trustee of said bankrupt estate on July 3, 1901, and duly qualified.

As to the allegations in said petition of the said Rogers & Bro. that they loaned said bankrupt $5,000, and received certain securities therefor, respondent neither admits nor denies the same
135 but calls for strict proof, and as to said alleged warehouse receipts claimed by said Rogers & Bro., as taken by them as col-

lateral security, and as constituting a lien upon or pledge of certain lots of said seed, respondent denies that said so called receipts were good and valid receipts to constitute such lien or pledge as against said bankrupt estate, and the creditors of said bankrupt, and respondent says said bankrupt on and for a long time prior to May 8, 1901, was a seed merchant, buying, selling and dealing in seed at said premises on Johnson Street, and that during said time and when said so called receipts were issued, was and continued always in the full possession and control of all of said seed, receiving and disposing of the same in the regular course of his business, and respondent denies that said National Storage Company had any warehouse or place of stroage on or at said premises or any possession or control of said premises or of said seed, and denies that said storage company was a warehouseman under the laws of Illinois; and as to said so called receipts 9154, 9155, 9224, 9227 and 9436, respondent says that the seed purported to be called for thereby always continued in the possession and control of said bankrupt as aforesaid, and as to many of said lots of seed referred to in said alleged receipts, the seed which was in said warehouse when said alleged loan was made was prior to said May 8, 1901, taken out and disposed of by said bankrupt and other seed substituted in place thereof, and some such substitutions of seed were made by said bankrupt under the alleged receipts which said Rogers & Bro. allege that they held prior to the receipts named in their said petition, all of which substitutions and alleged receipts were unknown to the other creditors of said bankrupt, so that the seed in all cases of such substitution which went into the hands of said Receiver and was sold by the First National Bank of Chicago, under the order of Court herein on August 5, 1901, on the 136 proceeds of which said Rogers & Bro. claim a lien and to be first paid by their said petition, was other and different seed from that called for in the said receipts; and respondent further alleges that some of said so called receipts were taken by said Rogers & Bro. after the said loan was completed and without any advancement made at the time so taken and are illegal preferences under the bankruptcy law.

As to the petition of said receiver filed May 13th, 1901, respondent says that said Rogers & Bro., First National Bank and National Storage Company appeared in this Court and filed their objections to the jurisdiction of the Court and said Rogers & Bro. and said bank set up against said petition of said Receiver the same claims of liens and pledges that they now set up in their respective petitions and said storage company set up that it had possession of the

seed called for under said so called receipts, and the said Receiver's petition and said objections and answers thereto were referred to the Hon. Sidney C. Eastman, Referee in Bankruptcy, by special reference, to take evidence and to report the same and his conclusion to the Court, and on said reference a large amount of testimony was taken and said referee made a report to the Court wherein he found that the receiver had not possession at or after the 8th day of May, 1901, nor the right of possession of said seed called for in said receipts, and that said storage company was at the date of the appointment of a Receiver in possession thereof and of the premises in which said property was stored, and said report recommended that an order accordingly be entered in this cause, and respondent alleges that on objections and exceptions to said report by said Receiver and certain other creditors of said estate, this Court held that said Receiver had received the said seed from said bankrupt peaceably and without any force, and that the Court had jurisdiction over the property and the Court sustained the 137 objections to said report as to jurisdiction and over-ruled the recommendations in said report as to the possession of said property, and resrved the rest of said report for future consideration.

And respondent says that the debts proven by the general creditors who are unsecured, and not including said First National Bank and said Rogers & Bro. exceed in amount $34,000, and that the other assets of said estate other than the proceeds of said sale made by said bank will be sufficient to pay only a small per cent of said debts proven against said estate.

Therefore respondent says that said Rogers & Bro. are not entitled to the relief prayed by them, and that their said petition should be dismissed at their costs and said proceeds of sale in the hands of said bank be turned over to the trustee in bankruptcy in said estate etc.

THE CHICAGO TITLE & TRUST COMPANY,
Trustee
by NEWTON WYETH,
its attorney

Endorsed: 5810. In re Alex Rodgers, Bankrupt. Answer of Trustee, to petition of Rogers & Bro. Filed Oct. 2, 1901 at 2 o'clock P. M. T. C. MacMillan, Clerk. Newton Wyeth, Attorney for Trustee.

138 And afterwards, towit, on October 2, 1901, there was filed in the Clerk's Office of said Court in above entitled cause, the Answer of Frank E. Winans, said Answer being in the words and figures following, towit:

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois.

In the Matter of
Alexander Rodgers,
Bankrupt.

The Answer of Frank E. Winans to the Petitions of First National Bank of Chicago and H. W. Rogers & Brothers, Petitioners:—

And Now Comes Frank E. Winans and for an Answer to the petitions of First National Bank of Chicago and H. W. Rogers & Brother heretofore filed in this cause, answering, says:

This Respondent Denies that said First National Bank of Chicago or H. W. Rogers & Brother are entitled to any lien whatsoever on the funds derived from the sale of the said seed as set forth in the report of the First National Bank of Chicago for the following reasons, to-wit:

1st. Said Storage Warrants or Warehouse Receipts referrd to in said petitions are fraudulent and void.

2nd. The property described in the so-called Storage Warrants or Warehouse Receipts was not in the possession of either the bankrupt, the National Storage Company, First National Bank of Chicago or H. W. Rogers & Brother, at the time the notes described in said petitions were executed and delivered to the petitioners; that said Storage Warrants or Warehouse Receipts

139 were a mere fiction and sham as to the possession of the property and were merely an effort to evade the Chattel Mortgage Laws of this State.

And This Respondent Further Shows to the Court, that he is engaged in the Commission business on the Board of Trade, and has been many years prior to the date of the filing of this Answer; that on or about the 26th day of April, A. D. 1901, a few days prior to the filing of the Bankrupt's petition herein, this respondent sold to the bankrupt a car load of Timothy seed; that the said seed was sold for the sum of Three Dollars and fifty-five ($3.55) cents per hundred pounds, to be paid for in cash by the bankrupt upon the delivery of the seed to said bankrupt.

That it is the common usage among the members of the Board

of Trade of the City of Chicago where said sale was made, including this respondent and the bankrupt, of which usage the bankrupt had notice, and according to which usage it became the duty of the bankrupt to have the seed weighed emmediately upon receipt of the same and thereupon to notify this respondent of the weight of the seed, and to thereupon immediately pay to your respondent the price for which the said grain was sold; and this respondent alleges that the delivery of said seed by this respondent to said bankrupt was not to be complete until this respondent had received from said bankrupt the notice of the weight of said seed, and that until this was done this respondent did not have the right to receive payment for said grain.

140 This Respondent Further Sets Forth that on or about the 1st day of May, 1901, the said seed came into the possession of the bankrupt herein, but that said bankrupt did not as required by said usage notify this respondent of the weight of said seed, although at various times between the 26th day of April, 1901, and the 8th day of May, 1901, this respondent requested the said bankrupt to notify him whether said seed had been weighed and the amount of said weight; and this respondent alleges that the delivery of said seed to said bankrupt has never been completed, that the said bankrupt has not, nor has any other person, paid to this respondent the purchase money for said seed, and that said seed has remained since the 26th day of April, 1901, and still does remain, the property of this respondent.

That on the 8th day of May, 1901, said bankrupt filed his petition in this court, and on the same day the Receiver herein was appointed; that said Receiver took possession of all the property and assets of said bankrupt, including the seed of this respondent.

That on the 9th day of May, 1901, this respondent made a demand in writing on the said Receiver to deliver to this respondent the said seed, and thereby rescinded the said contract and the sale of said seed, but that the said Receiver refused to deliver possession of said seed to this respondent.

That this respondent has rescinded and does again rescind, on account of the facts herein above stated, the said contract for the sale of said seed.

141 That on the 9th day of May, 1901, and after this respondent had rescinded said contract as aforesaid, and after the said Receiver had come into possession of said seed, the said bankrupt informed this respondent that said seed weighed twenty nine hundred & seventy two pounds.

This Respondent Further Answering Sets Forth that he consented to the sale of the said secd and all of the seed in the possession of the

Receiver herein, with the distinct provision that his rights should attach to the funds which came into the possession of the seller.

This Respondent, Therefore, Alleges that the sale of the said car load of seed to the bankrupt herein was never completed, and he is entitled to a lien on the funds in the hands of the First National Bank to the extent of Ten Hundred Fifty-Four Dollars and Ninety Cents ($1054.90), the purchase price of said seed.

This Respondent Further Alleges that on May 8th, 1901, the day of the filing of the bankruptcy petition herein, he visited the premises occupied by the bankrupt in the City of Chicago; that by means of the books of the bankrupt and with the assistance of the employees of the bankrupt he located the seed thus sold by him to the said bankrupt on the third floor of the premises occupied by the bankrupt; that said bags of seed bore the tags of the National Storage Company and indicated that said seed was held under a warrant issued August 31st, 1900.

142 This Respondent Further Alleges that First National Bank of Chicago claims said seed under a warrant issued on or about August 31st, 1900, which said warrant was issued some eight months prior to the sale by this respondent.

GREGORY, POPPENHUSEN & MCNAB,
Attys for Frank E. Winans.

Endorsed: Gen. No. 5810. Term No..... In the District Court of the U. S. In Re Alexander Rodgers Bankrupt. Answer of Frank E. Winans. Filed Oct 2 1901 at 3:55 o'clock P. M. T. C. MacMillan, Clerk. Law Offices of Gregory, Poppenhusen & McNab, 100 Washington Street, Chicago.

143 And afterwards, to wit: on the 3rd day of October, A. D. 1901 there was filed in said cause the petition of the National Storage Company, said petition being in the words and figures following, to wit:

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois.

In the matter of
Alexander Rodgers,
A Bankrupt. } General No. 5810.

To the Honorable Christian C. Kohlsaat, Judge of said Court:

The petition of the National Storage Company represents unto your Honor that it is a corporation duly organized and existing under and by the laws of the State of Illinois for the purpose of doing a warehousing business, as a warehouseman of Class "C" under the statutes of the State of Illinois, and that it is and has for many years last past been engaged as a warehouseman of said Class "C".

Your petitioner further represents that under and by virtue of an order theretofore entered by this honorable Court in this cause, the First National Bank of Chicago has recently sold certain lots and quantities of seed upon which your petitioner had prior thereto issued its thirteen warehouse receipts, as such warehouseman, bearing numbers 8406, 8408, 8437, 8489, 8928, 9118, 9195, 9244, 9246, 9348, 9425, 9426, and 9427, and which said warehouse receipts, after the same were so issued, had come into the possession and ownership of the said First National Bank of Chicago, as collateral security for the repayment of certain sums of money loaned by said bank to said bankrupt.

Your petitioner further represents that the said First Natinoal Bank of Chicago, after the aforesaid sale of said seed, and on, to-wit, the 13th day of September, 1901, filed its report of said sale in this cause, which said report was afterwards, and on, to-wit, the 23rd day of September, 1901, approved by this honorable court; that in and by said report of sale said bank reported that the proceeds of such sale amounted to $15,822.46, and that after pay-
144 ing the expenses of conducting said sale, amounting to $49.05, there still remained in the hands of said bank the sum of $15,773.41.

Your petitioner further represents that by the terms and conditions of the wrarehouse receipts so issued upon the said seed by your petitioner as aforesaid, and by the terms and conditions of the contract between your petitioner and said bankrupt, in compliance with which said warehouse receipts were so issued, your petitioner became and is now entitled under said contract and thirteen ware-

house receipts to storage charges upon said seed for the months of April, May, June, July and August, 1901, and to other charges in and about the care and custody of said seed, and expenditures in connection therewith, as follows:

(Item 1.)	Storage charges for the month of April, 1901, at 75 cents per $1,000.00 per month, on property of the value of $13,393.35.....	$10.05
(Iten 2.)	Storage charges for the months of May, June, July and August, 1901, involving additional services and risk, on said thirteen warehouse receipts, four months, at $7.50 per warehouse receipt per month.....	$390.00
(Item 3.)	Cash paid Mooney & Boland, custodians for your petitioner of the property covered by said warehouse receipts, during the months of May, June, July, and August, 1901...	$1,239.20
	Total	$1,639.25

Your petitioner further represents that said last mentioned item of $1,239.20 (Item 3.) was actually paid out and expended by your petitioner for the purpose of retaining possession of and preserving the property, and your petitioner's lien thereon, covered by said warehouse receipts.

Your petitioner further represents that no part of the said sum of $1,639.25 has been paid to your petitioner, and that under said warehouse receipts and the above mentioned contract upon which said said warehouse receipts were issued, your petitioner is legally as well as equitably entitled to a preference to the extent of the amount due him for each and all of the foregoing items numbered 1, 2 and 3, and is legally and equitably entitled to payment of each and
145 all of said amounts out of the proceeds of said sale remaining in the hands of said bank as aforesaid, and that your petitioner's said preference is and ought to be a first lien upon the said proceeds of said sale and ought to be first paid out of said funds; and that the said amount remaining in the hands of said bank as the proceeds of said sale, as aforesaid, is more than sufficient to pay the full amount due to said bank for which said warehouse receipts were pledged to said bank, as well as the full amount due your petitioner, as above set forth.

Your petitioner further represents that in and by the aforesaid order authorizing said First National Bank to sell the seed covered by the warehouse receipts issued by your petitioner and held by said First National Bank as aforesaid, the said First National Bank

was also authorized to sell certain oth- seed, covered by five certain other warehouse receipts thereto- issued by your petitioner to said bankrupt, and bearing numbers 9154, 9155, 9224, 9227 and 9436 respectively, and that in compliance with said order said Bank did afterwards proceed to sell, and did sell for the sum of $7,256.84 all of the seeds covered by said five last mentioned warehouse receipts, said warehouse receipts being then and there the property of and in the possession of the firm of H. W. Rogers & Bro., as collateral seecurity for the payment of certain moneys due from said bankrupt to said H. W. Rogers & Bro., and that there still remains in the hands of said bank as the proceeds of said sale, after paying the expenses thereof, amounting to $26.41, the sum of $7,230.43, all of which will more fully appear from the report of said sale filed by the said First National Bank in this cause on the 13th day of September, 1901, and afterward and on, to-wit, the 23rd day of September, 1901, approved by this honorable Court.

Your petitioner further represents that by the terms and conditions of said five last mentioned warehouse receipts, and by
146 the terms and conditions of the aforesaid contract between your petitioner and said bankrupt, in compliance with which said warehouse receipts were so issued, your petitioner also became, and is now entitled, under said last named warehouse receipts, to storage charges upon the seed covered by said receipts, for the months of April, May, June, July and August, 1901, and to other charges in and about the care and custody of said seed, and expenditures in connection therewith, as follows:

(Item 1.)	Storage charges for the month of April, 1901, at 75 cents per $1,000.00 per month on property of the value of $6,583.32.....	4.94
(Item 2.)	Storage charges for the months of May, June, July and August, 1901, involving additional service and risk, on said five warehouse receipts, 4 months, at $7.50 per warehouse receipt per month.....	$150.00
(Item 3.)	Cash paid Mooney & Boland, custodians for your petitioner of the property covered by said warehouse receipts, during the months of May, June, July and August, 1901,.....	$476.61
	Total	$631.55

Your petitioner further represents that said last mentioned item of $476.61 (Item 3) was actually paid out and expended by your

petitioner for the purpose of retaining possession of and preserving the property, and your petitioner's lien thereon, covered by said five last mentioned warehouse receipts.

Your petitioner further represents that no part of the said sum of $631.55 has been paid to your petitioner, and that under said last mentioned warehouse receipts, and the above mentioned contract upon which said warehouse receipts were issued, your petitioner is legally as well as equitably entitled to a preference to the extent of the amount due him for each and all of the foregoing items numbered 1, 2 and 3, and is legally and equitably entitled to payment of each and all of said amounts out of the proceeds of said sale remaining in the hands of said Bank as aforesaid; and that your petitioner's said preference is and ought to be a first lien upon the said proceeds of said sale. and ought to be first paid out
147 of said funds, and that said funds are more than sufficient to pay the full amount due to said First National Bank, as well as the full amount due your petitioner as above set forth.

Wherefore your petitioner prays that your petitioner may be decreed to have a first and prior lien and preference upon each of the said two funds so in the possession of the said First National Bank as aforesaid, and that an order may be entered by this Honorable Court authorizing and directing the said First National Bank to pay to your petitioner forthwith out of the said two funds so in the possession of the said Bank, as aforesaid, the said sums aggregating $1,639.25 and $631.55 respectively above mentioned.

NATIONAL STORAGE CO
By WALTER TOD,
Treasurer & Acting Manager.
NATIONAL STORAGE CO.
by WALTER TOD,
Treas. & Acting Mgr.

HECKMAN, ELSDEN & SHAW.
Solicitors and of counsel for said petitioner.

State of Illinois, } ss.
County of Cook. }

Walter Tod, being first duly sworn, deposes and says: That he is the Treasurer and Acting Manager of the National Storage Company, the above named petitioner; that he has read the foregoing petition by him subscribed, as Treasurer and Acting Manager of said National Storage Company, and that the same, and the matters therein set forth/ are true in substance and in fact.

WALTER TOD

Subscribed and sworn to before me this 3d day of October, A. D. 1901.

ALBERT COTSWORTH,
[SEAL] *Notary Public.*

148 Endorsed: No. 5810. United States District Court, Northern District of Illinois. In the matter of Alexander Rodgers, Bankrupt. Petition. Filed Oct. 3, 1901 at 3:15 o'clock P. M. T. C. MacMillan, Clerk. Heckman, Elsden & Shaw, Attorneys.

149 And afterwards, to wit: on the 8th day of October, A. D. 1901 there was filed in said cause the answer of J. A. Patten et al to the petition of the National Storage Company, said answer being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Northern Division.

In the matter of
Alexander Rodgers } No. 5810.
Bankrupt

Answer of James A. Patten and E. W. Bailey & Co., creditors to the petition of National Storage Company.

These respondents saving and reserving all benefit of exception and objections to the imperfections and insufficiency of said petition, for answer thereto, say that they are the principal creditors

of Alexander Rodgers, bankrupt, and that their claims represent more than a majority of the liabilities of said bankrupt, and that the said petitioner is not entitled to the relief asked for the following reasons, among others:—

1. The so-called storage warrants or warehouse receipts mentioned in said petition are fraudulent and void as to creditors of Alexander Rodgers, bankrupt.

2. The scheme by which the petitioner, the National Storage Company attempted to create liens on the property of said bankrupt was against public policy and rendered the so-called storage warrants, or warehouse receipts mentioned in said petition, absolutely null and void.

3. The National Storage Company is not a preferred creditor of said bankrupt.

4. Practically all of the claim of the National Storage Company is for caring for the property of the bankrupt after it was delivered to and in the custody and possession of the Trustee or Receiver of this Court. The petitioner is, therefore, not even a general creditor of said bankrupt.

5. These rexpondents deny that said bankrupt owes the petitioner any sum whatever, or that it has any claim whatever against his estate.

These respondents, therefore, deny that the said petitioner is entitled to any relief and pray that said petition be dismissed at petitioner's costs.

JOSEPH E. PADEN
Attorney for James . Patten, and
E. W. Bailey & Co. Creditors.

(Endorsed) #5810 U. S. District Court In re Alexander Rodgers Bankrupt Answer of J. A. Patten and E. W. Bailey & Co. to petition of National Storage Co. Filed Oct 8 1901 at 4-40 o'clock P. M. T. C. Mac Millan Clerk. J. E. Paden Attorney and Counsellor Chicago.

150 And afterwards, to wit, on the 11th day of October, A. D. 1901, there was filed in the Clerk's Office of said Court in the above entitled cause, the Answer of the Trustee to the petition of the National Storage Company; said Answer being in the words and figures following, to wit:—

IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois.

Northern Division.

In the matter of
Alexander Rodgers,
Bankrupt. } In Bankruptcy No. 5810.

Response of the Chicago Title & Trust Company, Trustee in Bankruptcy to the petition of the National Storage Company:

This respondent, trustee in bankruptcy herein, for the use of the creditors of said bankrupt estate, saving and reserving all benefit of exception and objection which may be had or taken to the said petition for the insufficiencies thereof, for answer thereto, says:

Respondent denies that said petitioner, the National Storage Company, is and has been a warehouseman of class "C" under the laws of Illinois, and denies it was such warehouseman with respect to the seed named in said petition or the premises where said seed was stored.

Respondent denies that said so-called and alleged warehouse receipts were valid receipts under the laws of Illinois, and denies same were valid receipts in the hands of said First National Bank or said H. W. Rogers & Bro., as collateral security or otherwise as alleged in said petition.

Respondent admits the sales were made by said Bank under the order of the Court in this cause as alleged, and that said Bank made report and that said report was confirmed by the Court, and that said Bank has the amounts in hand as alleged in said petition.

Respondent knows only by information and belief and the
151 allegations of said petition the alleged contract and conditions thereof that existed between said petitioner and said bankrupt, but on said information and belief alleges the facts to be that said contract and the terms and conditions thereof and said so-called receipts were as to said bankrupt estate and the creditors of said bankrupt invalid and fraudulent in law, and respondent denies that said petitioner is entitled to any lien or to be first paid, as prayed in its said petition, for said items of storage and charges, or any of them, but for anything that may be owing by said bankrupt or the said estate to said petitioner, said petitioner is entitled to make claim only as a general creditor, without preference.

Respondent as to items 2 and 3 set forth in said petition, says

that they are not legal or equitable claims or charges against said estate.

Respondent further alleges that the said seed referred to in said petition was a part of the estate of the said bankrupt and came to the hands of respondent as receiver of said estate appointed by this Court in this cause of May 8th, 1901, on which day said receiver received peaceable possession of said property, free from any liens, for the use of the creditors of said estate, and retained possession and care and custody thereof until it turned same over to said Bank for sale under said order of Court, and that on May 13th, such receiver filed its petition in this cause setting forth its possession of said seed with other property of said estate and praying for order of Court to sell the same, to which receiver's petition the said National Storage Company, said First National Bank and said H. W. Rogers & Bro. appeared and filed answers and claimed said seed liens and possession under the same alleged receipts, contracts and terms which are now set up by said Storage Company in its said petition, and the petitions of said Bank and said Rogers and Bro., filed in this cause in the month of September last, and that on said petition of said receiver and the answers thereto a special
152 reference was had to the Honorable Sidney C. Eastman, on which a large amount of testimony of the several parties was taken and reported by said referee to this Court, a part of which said report has been heard by the Court and a part reserved for further consideration, and has not yet been heard by the Court; that said hearing before said referee involved the validity of said warehouse receipts, and said contract alleged in the petition of said Storage Company and the possession of said seed, and the evidence there and then taken is applicable to the question of charges and liens now claimed be the petitioner and by said Bank and Rogers and Bro. under their said petitions, and should be considered by the Court on any hearing of said petition of the National Storage Company.

Respondent therefore denies that said Storage Company is entitled to any of the relief prayed by it, and says that said petition should be dismissed at the costs of said Storage Company, etc.

THE CHICAGO TITLE & TRUST COMPANY,
Trustee, etc.,
By NEWTON WYETH,
Attorney.

Endorsed: 5810. U. S. Dist. Court. In re. Alex. Rodgers, Bankrupt. Answer of Trustee to Petition of Nat'l Storage Co. Filed Oct. 11, 1901 at 10 o'clock A. M. T. C. MacMillan, Clerk. Newton Wyeth, Atty. for Trustee.

153 And afterwards, to wit: on the 11th day of October, A. D. 1901 there was filed in said cause the replication of H. W. Rogers, said replication being in the words and figures following, to wit:

United States of America }
Northern District of Illinois } ss.

IN THE DISTRICT COURT OF THE UNITED STATES
for the Northern District of Illinois.

In the matter of
Alexander Rodgers, Bankrupt. } In Bankruptcy No. 5810.

The replication of Henry W. Rogers and James C. Rogers to the several answers filed to their petition for the payment of note of five thousand dollars ($5000).

These repliants say that they will aver their said petition to be true, certain and sufficient in the law and that the answers of said defendants are untrue, uncertain and insufficient in the law and this they will aver, maintain and prove as this court may direct.

HENRY W. ROGERS
JAMES C. ROGERS
By .....
Their Solicitors.

(Endorsed) In Bankruptcy No. 5810. In the District Court of United States. Northern District of Ill. In the matter of Alexander Rodgers, Bankrupt. Replication of H. W. Rogers. Filed Oct 11 1901 at 10 o'clock A. M. T. C. MacMillan, Clerk. Kerr & Kerr

154 And afterwards, to wit: on the 11th day of October, A. D. 1901 the following order was had and entered of record in said cause before the Hon. Christian C. Kohlsaat, Judge, to wit:

In re
Alexander Rodgers, Bankrupt. } No. 5810.

On motion of the Chicago Title and Trust Company, trustee, all parties in interest being notified and present in court, it is ordered by the court that the petitions of the First National Bank of Chicago, H. W. Rogers & Brother, and the National Storage Company, together with the answers thereto, filed herein in September and October, 1901, be consolidated for hearing, and that the same be and they are hereby referred to the Honorable Sidney C. Eastman, referee, to take the additional proofs of any of the parties and to report the same to the court, and that thereupon the matters involved in the said petitions and answers be heard by the court upon the said evidence and the evidence heretofore taken by the said referee so far as the same shall be material.

155 And afterwards, to wit: on the 3rd day of January, A. D. 1902, the following order was had and entered of record in said cause, before the Hon. Christian C. Kohlsaat, Judge, to wit:

In re
5810 Alexander Rogers Bankrupt. }

On motion of the Chicago Title and Trust Company, Trustee in Bankruptcy in this cause, and on due notice to the First National Bank of Chicago, H. W. Rogers and Brother, and the National Storage Company, said motion being by petition of the said Trustee filed herein this day it is

Ordered that the said First National Bank turn over from the proceeds of sale of seed made by it pursuant to the order of Court herein of August 5, 1901, to the said trustee the sum of Five Thousand dollars ($5000.00) as assets of the said bankrupt estate, without prejudice to the rights and interests of said First National Bank, H. W. Rogers and Brother, and the National Storage Company or the claims of them or any of them to liens and priority of payment, to or upon said proceeds of said sale, and the payment of any further part of said proceeds by said First National Bank over to said trustee before the final determination of said claims for lien and priority is reserved for the future consideration of the Court.

156 And afterwards, to wit: on the 25th day of February, A. D. 1902, the following order was had and entered of record in said cause before the Hon. Christian C. Kohlsaat, Judge, to wit:

In re
5810 Alexander Rodgers
Bankrupt

On motion of the Chicago Title and Trust Company, trustee herein, It is Ordered by the Court that leave be and hereby is given said trustee to amend its answers to the petitions of the First National Bank, H. W. Rodgers & Bro., and the National Storage Company, respectively, so as to conform to the evidence.

157 And afterwards, to wit: on the 25th day of February, A. D. 1902 there was filed in said cause the amended answer of the trustee to the petition of the First National Bank, said amended answer being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES.

Northern District of Illinois.

In the matter of
Alexander Rodgers, } No. 5810.
Bankrupt.

Amendment of Chicago Title & Trust Company, filed by leave of Court, to the response of said Trust Company heretofore filed to the petition of the First National Bank:

Come now the Chicago Title & Trust Company, Trustee and etc. and by leave of Court amends its said response by adding thereto the following:

And Respondent alleges that for a period of four (4) months prior to said eighth day of May, said Alexander Rodgers was and continued insolvent within the meaning of the Bankruptcy Act and until he was adjudged a bankrupt as aforesaid alleged, and that within said period of four months immediately preceding the filing of said petition in bankruptcy, said First National Bank received from said bankrupt payments on account of the indebtedness owing by said bankrupt to it, said Bank, and that the same were prefer-

ences within the meaning of said Act; that said Bank still retains said payments and has not surrendered the same or any part thereof to said bankrupt estate but claims the right to retain the whole of said payments, and that, if the said Bank retains said payments, the effect will be to enable said Bank as a creditor of said bankrupt estate to obtain a greater percentage of its debt than any other of the creditors of the same class as said Bank, and that there are other creditors of said estate of the same class with said Bank.

158 And Respondent further shows that if the said First National Bank be allowed through any proceedings of this Court in this cause of Bankruptcy to retain the proceeds of said sale or part thereof as claimed by it in said petition or apply said proceeds so claimed on account of the said indebtedness owing said Bank, the same would create and give said Bank an unlawful or illegal preference by such amount so allowed to be paid or applied over such other creditors of the same class in said bankrupt estate as said Bank, and the effect would be to enable said Bank to obtain a greater percentage of its said debt than any other such creditors of the same class would or could obtain.

Therefore this Respondent as such trustee and on behalf of the creditors of said bankrupt estate, prays as it has already prayed in its said response, and further prays that said Bank, before it is allowed to share in said estate be decreed to surrender up its said preferences, and in default of so doing, said Bank be not allowed its said claims for indebtedness against said estate; and that the said alleged claims and prayer of said First National Bank to have a so called lien or preference upon the proceeds of said sale be denied, as that the same would if allowed, create and enforce and unlawful or illegal preference, as above alleged, against the provisions of the said bankruptcy Act.

NEWTON WYETH,
Attorney for Chicago Title & Trust Company, Trustee & for Creditors.

(Endorsed) 5810 United States District Court In re Alexander Rodgers, Bankrupt. Amendment to response to petition of First Natl. Bank Filed Feb 25 1902 at 10 o'clock A. M. T. C. Mac Millan Clerk. Newton Wyeth, Atty. for Trustee.

159 And afterwards, to wit: on the 25th day of February, A. D. 1902, there was filed in said cause an amendment to the answer of the trustee to the petition of H. W. Rogers & Bro., said amendment being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES.

Northern District of Illinois.

In the matter of
Alexander Rodgers,
Bankrupt. } No. 5810.

Amendment of response of Chicago Title & Trust Company to the Petition of H. W. Rogers & Bro.

Comes now the Chicago Title & Trust Company, Trustee, etc. and by leave of Court amends said response by adding thereto the following:

And respondent alleges that for a period of four months immediately preceding said 8th day of May, and until he was adjudged a bankrupt, as aforesaid alleged, said Alexander Rodgers, was insolvent within the meaning of the Bankruptcy Act; and respondent further shows that if said H. W. Rogers & Bro. be allowed through any proceedings in this cause of bankruptcy to be paid a portion of the proceeds of said sale of seed in discharge of the indebtedness alleged in their said petition to be owing by said bankrupt to them, the effect of the same would be to create and give said Rogers & Bro. an unlawful or illegal preference by the payment of such amount so allowed to be paid or applied over other creditors of the same class as said Rogers & Bro. in said Bankrupt estate and the effect would be to enable said Rogers & Bro. to obtain a greater percentage of its said debt than any other such creditors of the same class, and respondent alleges that there are such other creditors.

Therefore this respondent prays as it has already prayed in its response heretofore and further prays that said H. W. Rogers
160 & Bro. be denied the prayer of their said petition, as that the allowance of the same and the enforcement thereof would create and enforce an unlawful or illegal preference as above alleged and against the provisions of the said bankruptcy Act.

NEWTON WYETH,
Attorney for Chicago Title & Trust Company, Trustee & for Creditors,

(Endorsed) 5810 United States District Court In re Alexander Rodgers, Bankrupt. Amendment to response to petn. of H. W. Rogers & Bro. Filed Feb 25 1902 at 10 o'clock A. M. T. C. Mac Millan Clerk. Newton Wyeth Atty. for Trustee.

161 And afterwards, to wit: on the 25th day of February, A. D. 1902, there was filed in said cause an amendment to the answer of the trustee to the petition of the National Storage Company, said amendment being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES.

Northern District of Illinois.

In the Matter of Alexander Rodgers, Bankrupt. } Gen. No. 5810.

Amendment of responses of Chicago Title & Trust Company to the petition of the National Storage Company.

Comes now the Chicago Title & Trust Company, trustee etc. and by leave of Court amends its said response by adding thereto the following:—

And respondent alleges that for a period of four months immediately preceding said 8th day of May, and until he was adjudged a bankrupt as aforesaid alleged, said Alexander Rodgers was insolvent within the meaning of the Bankruptcy Act; and respondent further shows that if said National Storage Company be allowed through any preceeding in this cause of bankruptcy to be paid a portion of the proceeds of said sale of seed in discharge of the indebtedness as prayed in their said petition, the effect of the same would be to create and give said National Storage Company an unlawful or illegal preference over other creditors of the same class as said National Storage Company in said bankrupt estate, and the effect would be to enable said Storage Company to obtain a greater percentage of its said debt than any other creditors of the same class, and respondent alleges that there are such other creditors.

Therefore this respondent prays as it has already prayed in its said response and further prays that petition of said National Storage Company be denied, as that the same would create and enforce an unlawful or illegal preference as above alleged, against the provisions of the said Bankruptcy Act.

NEWTON WYETH
Atty for Chicago Title & Trust Company, Trustee & for Creditors—

162 (Endorsed) 5810 U. S. Dist. Court In re Alexander Rodgers, Bankrupt. Amendment to response to petition of National Storage Co. Filed Feb 25 1902 at 10 o'clock A. M. T. C. Mac Millan Clerk. Newton Wyeth Atty. for Trustee.

163 And afterwards, to wit: on the 29th day of October, A. D. 1902, the following order was had and entered of record in said cause, before the Hon. Christian C. Kohlsaat, Judge, to wit:

In re
5810 Alexander Rodgers,
Bankrupt.

This cause coming on now to be heard, it is on motion Ordered that the First National Bank of Chicago, have leave to amend its petition on the face thereof by striking out the words "an equitable" and inserting in lieu thereof the article "a" in the sixth line of the fifth page of said petition, which is thereupon done; and it is further

Ordered that all answers to said petition as originally filed shall stand as answers to the same as amended.

And this cause coming on now to be heard upon the petition of the receiver and trustee herein, the Chicago Title and Trust Company, the amended petition of The First National Bank of Chicago, Illinois, the petition of H. W. Rogers and James C. Rogers; the petition of the National Storage Company; the petition of Frank E. Winans; and upon the answers to said several petitions of the various creditors and parties, and upon the report filed herein August 5, 1901, of the referee Sidney C. Eastman, and upon the exceptions to said report, and upon the evidence taken before said referee to whom the said several petitions have been heretofore referred; and the said several petitioners and creditors and parties being represented and being in court herein; and the said bankrupt Alexander Rodgers being represented by his counsel; and the court having considered said several petitions and the referee's report, and the evidence taken before the referree and having heard the
164 arguments and suggestions of counsel for said several petitioners and for the various creditors and parties and for the said bankrupt and being fully advised in the premises the Court doth

Order, adjudge and decree that the said report of the said referee heretofore filed herein on August 5, 1901, be and the same is hereby approved and confirmed, except in so far as the same finds a lack of jurisdiction in this Court, which jurisdiction is hereby sustained.

And the court further finds that the receiver in this case had not, at the time of the filing of its petition herein, towit, on May 13, 1901, the right of possession of the property designated in the answers of the National Storage Company, The First National Bank, H. W. Rogers & Bro., Small & Co. and Kirkpatrick & Co., thereto.

And the Court further finds that the National Storage Company was at the said date, and also at the time of the filing of the peti-

tion in bankruptcy herein, entitled to possession, and had possession of said property.

And it further appearing to the Court that the property described in said petitions has been sold by The First National Bank of Chicago, under an order heretofore entered herein; and that the proceeds of said sale are now in possession of said The First National Bank of Chicago, Illinois, except the sum of Five Thousand Dollars ($5,000.00) heretofore paid over by said The First National Bank of Chicago, Illinois, to the Trustee herein, under an order of Court heretofore entered herein; and it further appearing to the Court that the said The First National Bank of
165 Chicago is justly and equitably entitled to be paid out of said fund the sum of Nine Thousand Eight hundred and fifty-four dollars and fifteen cents ($9,854.15) with interest thereon at the rate of five per centum per annum according to the tenor of the promissory notes of the bankrupt mentioned in said petition of said bank, which said promissory notes are secured by the following storage warrants of the National Storage Company, to-wit:

Receipt No.	9426	Lot No.	60	244	bags	Hungarian	seed
" "	9427	" "	61	80	"	Clover.	
" "	9425	" "	59	250	"	Hungarian	
" "	9348	" "	58	70	"	Alsike	
" "	9246	" "	50	322	"	of Timothy	
" "	9145	" "	47	351	"	" Buckwheat	
" "	9244	" "	54	250	"	" Timothy	
" "	9118	" "	40	247	"	"	
" "	8408	" "	8	250	"	"	
" "	8489	" "	25	250	"	"	
" "	8928	" "	33	250	"	"	
" "	8406	" "	6	225	"	"	
" "	8437	" "	20	250	"	"	

And it further appearing to the Court that the said petitioners H. W. Rogers and James C. Rogers are also justly and equitably entitled to be paid out of said fund the sum of Five Thousand dollars ($5,000.00) with interest thereon at the rate of five per cent per annum according to the tenor of the promissory notes of the bankrupt mentioned in said petition of said H. W. Rogers & Brother, which said promissory notes are secured by the following storage warrants issued by the National Storage Company, to-wit:

Receipt No.	9154	Lot No.	43	250	bags	Timothy	seed
" "	9155	" "	44	250	"	"	"
" "	9224	" "	50	250	"	"	"
" "	9227	" "	53	250	"	Red Top	"
" "	9436	" "	62	221	"	Buckwheat	"

166 And it further appearing to the Court that the said petitioner National Storage Company is entitled to the sum of Fourteen Dollars and ninety nine cents ($14.99) for storage charges upon said property, due at the date of filing the petition in bankruptcy herein, under its contract with said bankrupt; and it further appearing to the Court that said National Storage Company is entitled to a preferential claim and lien on said fund for payment of the said sum of Fourteen dollars and ninety-nine cents ($14.99); It is therefore

Ordered, adjudged and decreed by the Court that said The First National Bank of Chicago, retain out of the proceeds of said sale the sum of Nine Thousand, eight hundred and fifty-four dollars and fifteen cents ($9,854.15) with interest at the rate of five per cent per annum as aforesaid; and that said The First National Bank of Chicago pay over to said H. W. Rogers & Bro. out of said funds in its hands as aforesaid the said sum of Five Thousand Dollars ($5,000.00), together with interest thereon at the rate of five per centum per annum as aforesaid, and that said The First National Bank of Chicago also pay over to said National Storage Company out of said funds in its hands as aforesaid the sum of Fourteen dollars and ninety-nine cents ($14.99); and that said The First National Bank of Chicago pay over to the Trustee in said cause, the Chicago Title and Trust Company, the balance of the proceeds of said sale, And the Court doth further

Order, adjudge and decree that the Trustee herein, the Chicago Title and Trust Company pay all the costs arising under
167 the hearing of the said petitions of the Chicago Title and Trust Company, The First National Bank of Chicago, H. W. Rogers and James C. Rogers and the National Storage Company, including the referee's fees, and the costs, amounting to Two hundred and twelve dollars and fifty cents ($212.50) of printing the abstract, which costs of printing the court finds have been advanced by the National Storage Company. The Court doth further

Order, adjudge and decree that the petition of Frank E. Winans aforesaid, and any and all other petitions filed in said cause, claiming any right to or lien on any portion of the property described in the foregoing petitions and storage warrants, and not heretofore disposed of, be, and the same are hereby dismissed.

And thereupon, said Chicago Title & Trust Company, Trustee, by its counsel duly excepts to the said findings and the said judgment and decree of the Court, and prays an appeal herein from the said judgment and decree, and the said James A. Patten, by his counsel duly excepts to the said findings and the judgment and decree and likewise prays an appeal herein from said judgment and

decree, and prays also, to join in said appeal of said Trustee, to the United States Circuit Court of Appeals in and for the Seventh District.

168 And afterwards, to wit: on the 29th day of October A. D. 1902 there was filed in said cause a stipulation, said stipulation being in the words and figures following, to wit:

IN THE UNITED STATES OF AMERICA, DISTRICT COURT,

Northern District of Illinois,

Northern Division.

In re Alexander Rodgers, Bankrupt	In Bankruptcy No. 5810

In the matters of the petition of the Chicago Title & Trust Company receiver in bankruptcy, filed May 13, 1901, petition of Frank E. Winans, filed May 17, 1901, and petition or answer of the First National Bank of Chicago, filed May 16, 1901, petition or answer of H. W. Rogers & Brother, filed May 16, 1901, answer of the National Storage Company filed May 16, 1901, and the answer of James A. Patten to said petition of the receiver; the petition of the First National Bank of Chicago filed September 16, 1901, petition of H. W. Rogers & Brother, filed September 23, 1901, petition of the National Storage Company, filed October 3, 1901, and the answers and amendments to answers, of the Chicago Title & Trust Company, trustee in bankruptcy, and the answer of James A. Patten, filed to said petitions:

It is hereby stipulated by and between the parties to the above matters, consolidated for hearing by the Court, that the printed abstract of the evidence taken before Sidney C. Eastman, referee in bankruptcy, to whom said matters were referred by the Court, prepared by the National Storage Company, stand and be taken, in lieu of the full transcript of evidence and exhibits taken on said references, as the evidence on the trial and hearing of said matters, subject to any objections as to materiality or competency as to any part that have been preserved in said abstract, or that have been or may be taken to same or any part thereof by objections made or filed in or to the said transcript of evidence by any party, that any party shall have the right to present on the trial or hearing any portion of said transcript and exhibits that he deems not sufficiently set forth in said abstract, subject to objections as to materiality or incom-

petency as aforesaid; that the cost of printing said abstract, $280.00, which has been paid by the said National Storage Company, may be taxed as costs upon final decrees or judgments entered in said matters, as the Court shall determine; that any of the parties hereto shall be allowed from the copies that are on hand of said printed abstract the necessary and proper number of copies of said printed abstract for use in making up record and for use for printed record on appeal, writ of error or review in appeal courts in said matters.

Chicago, Oct. 21, 1902.

HECKMAN ELSDON & SHAW
Attorneys for National Storage Company.
KERR & KERR
Attorneys for H. W. Rogers & Brother
GREGORY POPPENHUSEN & MCNAB
Attorneys for F. E. Winans
NEWTON WYETH
Attorney for Trustee.
ORVILLE PECKHAM
Attorneys for First National Bank
JOSEPH E. PADEN
Attorney for James A. Patten

(Endorsed) 5810 U. S. Dist. Ct. In re Alexander Rodgers, Bankrupt. Stipulation Filed Oct 29 1902 at 10 o'clock A. M. T. C. MacMillan Clerk.

169 And afterwards, to wit: on the 29th day of October, A. D. 1902, the following order was had and entered of record in said cause, before the Hon. Christian C. Kohlsaat, Judge, to wit:

In re
5810 Alexander Rogers.
Bankrupt.

On motion and by stipulation of the parties hereto, it is

Ordered by the court that on the appeal herein an anstract of the testimony be used instead of the testimony in full.

170 And afterwards, to wit: on the 29th day of October, A. D. 1902 there was filed in said cause an abstract of testimony, said abstract being in the words and figures following, to wit:

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IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE NORTHERN DISTRICT OF ILLINOIS.

In Bankruptcy.

In the matter of Alexander Rodgers, Bankrupt. No. 5810.

CERTIFICATE OF EVIDENCE.

Be it remembered that upon the reference to Hon. Sidney C. Eastman, one of the referees in bankruptcy of this court, of the several petitions filed herein, to wit: the petition of the receiver herein, Chicago Title & Trust Company, filed May 13, 1901; the petition of Sydney H. Warner and J. Herrick Wilbur, filed May 13, 1901; the petition of Peter H. Eschenburg and James R. Dalton, filed May 16, 1901; the petition of John F. Harris and Samuel C. Scotten, filed May 16, 1901; the petition of Frank E. Winans, filed May 17, 1901; the petition of Henry Hemmelgarn and Phillip H. Schifflin; the petition of the First National Bank of Chicago; the petition of Henry W. Rogers and Brothers; and the petition of the National Storage Company; and upon the answers to said several petitions of the various creditors and parties, the following evidence was introduced and heard before the said referee, at his office, Room 714 Monadnock Block, in Chicago, in the said district, commencing on Wednesday, the 22nd day of May, A. D. 1901, at the hour of 10:30 o'clock A. M.

The referee having ruled that under the petitions and answers the burden was upon the National Storage Company to put in its case first,

GEORGE R. BARD was accordingly produced, sworn and examined, on the part of the National Storage Company, on May 22, 1901, and testified as follows:

Direct Examination by Mr. Heckman.

Am in the employ of the Chicago Title and Trust Company, as custodian. Was connected with them May 10th last. On that day was at warehouse of Alexander Rodgers. On the 8th of May took possession of the property, took the keys to all the doors. Had a key to the safe. When I went there the employes of Mr. Rodgers were there; Mr. Vaas handed me the keys to the safe. There was conversation between me and Mr. Vaas as to property stored by the National Storage Company in the building. Mr. Vaas had been book-keeper of Alexander Rodgers. The conversation was general. He took me over the building and showed me the property. When I first went there I do not believe we had any conversation at all about the stuff in storage. We had conversations; I could not tell exactly what it was, but I remember I just went in and served notices on Mr. Vaas that the Chicago Title & Trust Company had been appointed receiver in the bankruptcy estate of Alexander Rodgers. We talked the matter over. I says, "I want to see what the property is," and he took me all over the building and showed me the property. There was conversation later between me and Mr. Vaas about the property that the National Storage had in its possession there; we did go into that later. We went all round the floors. I first found Mr. Vaas right in the office on the second floor. He gave me the keys to the outside doors and the keys to the safe. The first place I went to was down in the basement. I saw seed there—I suppose it was seed, bagged up. I saw some tags on them. There was "Alexander Rodgers, Storage," on some of them, and a little small tag about that size (indicating), "National Storage Company." About the size of the card produced, four by five inches. The words on the tag were just the same as on the tag produced. It was a *facsimile* of the card produced so far as the printing matter goes. I saw the tags on various piles of property in the basement. I did not notice particularly how many piles in the basement had the tags of the National Storage Company upon them. I have not noticed those tags on those piles since that day. We went there on May 8th. They were there as long as I was there; I have not been there since last Saturday. I did not count the number of bags on which I saw those tags of the National Storage Company; not at that time. I have counted them. I do not believe

I counted the number of piles that had the National Storage tags on. The bags were piled about seven high and out in rows, I should judge, of twenty or twenty-five in a row. I would not be positive, but I do not think there were any marks in the basement on the cards on the premises dividing the space in anything like sections or otherwise. I could not be positive. I did not ex-
11 amine about that in the basement. The bags were in piles laid in tiers. I cannot tell how many in each pile; I don't remember that. I made a list of them, there is an inventory. I might from the inventory state the number of piles and the number of bags in each of the piles, if they have not been removed; the bags were there when I took the inventory. It had not been moved when I left there; it had been left there just as I found it. I think I could tell if I had that inventory the number of piles and the number of bags in each pile. I have not the copy of the inventory here; I can produce it. I think the piles had just the same tag as that
12 produced, and the same writing on; about the same size. There was just one tag on a pile, just on the front of it, you know; it was a long tier, piles seven and eight high. The tag was on one bag in the front of that tier; one bag would be tagged, and not the rest. I think I stated the number of bags there were in that pile. That stated the section of the warehouse in which it was just the same as that one (indicating) is filled out, about the same. I had the book-keeper do the writing in making an original list or inventory. I do not know how many piles there were in the basement that had the National Storage Company ticket on; I think I can tell that from the original paper. I think then we went back to the second floor and we went then from one floor to another. We
13 found property on the second floor with the tags of the National
14 Storage Company upon it. On the second floor the bags were piled just the same as in the basement. They varied, I think; some piles would vary in the height of them; some of them would be seven or eight, and some six bags. There were no indications on the second floor of spaces over them on cards showing the sections. If I remember rightly, there were no sections marked there at all on the second floor anywhere. I do not remember how many piles there were on the second floor; it would be impossible to tell definitely. I then went to the third, and so on up. I would not be positive now about the other floors, above the second, whether we found goods marked with the same tags of the National Storage Company; there are some floors that have not got any seed with the National Storage Company's cards on, but I cannot remember
15 exactly which floors those are. I had conversations with Mr. Vaas about the property in the possession of the National
16 Storage Company. I took the keys to the safe. I saw leases

there and other papers, but they were in the possession of the
17 receiver. I did not examine the papers in the safe; I turned them over to the receiver, all the papers that were in the safe.

WALTER TOD, being duly sworn, testified as follows:

Was treasurer and acting manager of the National Storage
18 Company for about four years. My duties were to superintend the making of contracts and the issuance of warrants, and in general have charge of the company's affairs. Was acting manager in August last. The paper shown me is signed by myself as treasurer of National Storage Company, and by the bankrupt Rodgers. Paper marked "Exhibit A" introduced in evidence, as follows:

PROPOSAL FOR WAREHOUSING.

OFFICE OF NATIONAL STORAGE COMPANY,
CHICAGO, Ills., August 25th, 1900.

Mr. Alexander Rodgers,
#220 Johnson Street, Chicago, Illinois.

DEAR SIR: 1. The National Storage Company hereby proposes to issue its storage warrants to the order of yourself or to such order as the acceptor hereof may hereafter direct, upon personal property consisting in part of Field Seeds to be stored in the premises known as #220-#230 Johnson street, Chicago, Illinois.

2. All of the above named premises, or such portions thereof as may from time to time be required, shall as and when required be leased to the National Storage Company. Said premises are to be designated as National Storage Company's Warehouse Premises Number 281.

3. Rates, Terms and Conditions which shall govern the storage of property or issue warrants under this proposal are as follows:

On property valued at $10,000 or less, the charge for the first calendar month or fraction will be $7.50, for each succeeding month or fraction $7.50, and for each additional $1,000 or fraction, the rate will be $.75 per month.

All traveling expenses and other incidental expenditures incurred while conducting the business under this proposal, and all costs of placing property in store, such as measuring, weighing, tallying, surveying, platting or drafting, etc., will be added to above charges. A certified memorandum must be rendered, showing market value of the property placed in store on which storage charges are to be based.

4. Substantial fences, gates, partitions, doors or other forms of enclosure, for enclosing or protecting property, for which warrants of this Company have been or may hereafter be issued, shall be constructed and kept in repair by acceptor hereof, and if not so constructed or repaired upon request, this Company is hereby authorized to forthwith construct or repair same, and place any cost therefor as a charge against the property enclosed or protected thereby.

5. Any and every lease executed in pursuance of this proposal shall, upon written notice delivered to the National Storage Company by the acceptor hereof, be duly cancelled and the premises surrendered only when and after all warrants issued under, upon or by reason of any and every application executed by such acceptor, shall have been delivered to this Company under terms and conditions of this proposal and said warrants.

6. It is understood unless otherwise provided, in writing that this proposition under its terms contemplates, that the quantity of grain which may be received for storage, shall be determined by a measured bushel standard. Grain will be received by weight and so accounted for, charges for weighing by this Company's representative to be paid by acceptor hereof.

7. Storage charges are due and payable as elected by this Company, at time of delivery, monthly, or at close of each calendar quarter. It is provided, that if for any cause delivery of property be made on which storage charges have not been paid, the remaining property will be held liable for same and all other charges which may have accrued. The costs for delivery of property when attended by superintendence of this Company are not rated as storage charges. Such costs and other contingent expenses will form basis for additional charge. Surrender of warrants and payment of charges to date of such surrender will not cease or terminate storage charges until property has been accepted, and Release Permits have been signed by party authorized to receive the property surrendered, and permits have been received at office of this Company.

8. Should increased cost, or additional services, or risk, in reference to said property or warrants, be incurred by reason of the sale or pledge of the warrants, and the property, covered thereby, then the rates on each warrant, shall be such as shall be fixed by this Company, not exceeding the rates named herein.

9. The services of a capable person satisfactory to this Company must be provided to represent its interests, such persons shall also be acceptable to any surety company from whom indemnity bond may be asked in adequate amount, and commensurate with value of property received by this Company and covered by its warrants. To defray cost of bond and services of such custodian a

charge against the property will be made, unless otherwise adjusted.

10. This Company reserves the right to recall and issue new warrant, for remainder of any warrant having three or more endorsements thereon of property delivered therefrom, also to recall and issue new warrant for remainder of any warrant, at expiration of one year, from its date having one or more endorsements thereon of property delivered therefrom, provided, that in either case the guarantee afforded by endorsers is not affected thereby.

11. It is understood, that while the identity of each respective lot of property received by this Company, shall always be maintained, any surplus remaining after the delivery of any certain lot or lots may be retained by the Storage Company until all charges are paid, and all warrants issued in pursuance of this proposal shall have been surrendered and satisfied.

12. It is to be understood also, that should this Company at any time hereafter, for any reason deem the premises furnished for its occupancy insecure for its purposes, or, for any cause be interfered with in the possession or removal of property covered by its warrants, or be dispossessed of the storage premises, which are now or may hereafter be leased to it, that it is hereby authorized, without notice to holders of warrants upon all or any part of the property stored in such premises, to provide other suitable storage premises, move the property thereto, and cause policies of insurance to issue thereon to its own order in trust for amount of value shown by said valuation memorandum, or more at its discretion. All costs or expenses accruing by means of such removal, interference or dispossession, including insurance premiums, and increased rental paid by this Company, for space occupied by such property, shall be chargeable against the property in addition to the storage rate above specified. And if the same or any other charges are and remain unpaid for ninety days or more, this Company is hereby authorized to sell the property in the manner, legally provided for enforcing warehousemen's lien, and shall apply the proceeds of such sale:

First: to the payment of all costs and expenses of such sale.

Second: to the payment of all sums due this company under, upon or by reason of this proposal, and the overplus if any, shall be held for and upon demand paid to the party or parties legally entitled thereto. When this Company shall have given the legal notice and sold the property as provided thereunder; then all warrants affected thereby shall be null and void as against the National Storage Company.

13. The Property delivered for purposes of storage must remain undisturbed until warrants covering same are surrendered,

received at office of this Company in Chicago and "Release Permits" duly received and countersigned by Custodian in charge and receipt signed for property by party authorized to receipt for same.

14. The acceptance hereof shall empower The National Storage Company to place its signs and marks upon the property and enclosure to such an extent as shall fully protect possession in compliance with laws regarding same, which signs and marks must at all times remain undisturbed and unobscured.

15. Upon conclusion and settlement of all business under this proposal, all copies of original and duplicate papers, shall, upon request of this Company be cancelled and returned to it.

Very respectfully,

NATIONAL STORAGE CO.,
By WALTER TOD,
Treasurer.

Accepted. ALEX. RODGERS.

WITNESS: That was executed about August 25, 1900. A lease was made pursuant to that contract.

Lease identified. Signature of Alexander Rodgers and National Storage Company proved. Signed August 31, 1900. Offered and admitted in evidence, as follows:

EXHIBIT B.

National Storage Company's Lease No....

THIS AGREEMENT, Made this thirty-first day of August, in the year of our Lord one thousand nine hundred ..... between ALEXANDER RODGERS, of Chicago, County of Cook, and State of Illinois, party of the first part, and NATIONAL STORAGE COMPANY, a corporation organized and existing under the laws of the State of Illinois, party of the second part.

WITNESSETH: That the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned and contained, to be kept and performed by the said party of the second part, its successors and assigns, hereby does demise, lease and let unto the said party of the second part the following described premises, situated in the City of Chicago, County of Cook and State of Illinois, to wit:

All of the basement and second floor, the North Half (N. ½) of the third (3) and fourth (4th) floors and all of the fifth (5th) and sixth (6th) floors of the six (6) story and basement Brick Building situated at and known as #220-#222-#224-#226-#228 and #230 Johnson Street, for and during the term of three years from and after the date of this Agreement, (and so long thereafter as property remains thereon for which warrants of said Storage Company have been issued, and are in force and effect,)

for a yearly rental of One Dollar, and other good and valuable considerations, the receipt of which in advance, is hereby acknowledged by party of the first part.

This lease is made upon the express conditions following, to wit:

FIRST. That the said leased premises shall be used and occupied exclusively for the storage of Personal Property, and for the transaction of such other business as may be connected therewith, or incident thereto, in pursuit of any rights claimed in performance of duties of said Storage Company as Warehousemen.

SECOND. That the said second party will not receive upon premises above described any property for purposes of storage, after due notice in writing has been received by said Storage Company, from said first party, that termination of this lease is desired.

THIRD. Said party of the second part its agent or agents shall, for the purpose of inspection or removal of any property which may be located in premises herein leased, be permitted easy and convenient passage at any and all times, through any part of the abutting premises that is or may hereafter be occupied or controlled by said party of the first part.

FOURTH. Said party of the second part shall, for the convenient moving of property to or from the above described premises, have free from cost of operation the use of elevators, tracks, cars, scales, scale house, and any other fixtures or appliances that party of first part now has or may acquire during term of this lease, and shall be privileged to place any marks, signs or other evidences of possession which it may deem necessary or desirable.

FIFTH. It is understood and agreed to by and between the parties hereto that the "moving of property" shall include the complete delivery of same on cars, wagons, or other means of transfer should party of the second part so elect.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals the day and the year first above written.

[L. S.] ALEXANDER RODGERS, [SEAL.]
[L. S.] NATIONAL STORAGE COMPANY, [SEAL.]
By WALTER TOD.

WITNESS: Under my direction possession of the leased
22 premises was taken by our custodian upon the date of the lease, and upon that day certain property was also taken possession of by the same custodian and at the same place. I was
23 not present with the custodian when he took possession of the property at that time; the man reported to me.

(Motion to strike out, and motion sustained.)

WITNESS: I know of my own knowledge that possession was taken under that lease. I was present at the premises myself at a more recent date.

(Objection by counsel to the witness stating that possession was taken; objection sustained.)

WITNESS: I know of my own knowledge that possession was taken under this lease. I know that we were in possession of the property at a subsequent date. I was there on the premises myself the day the officer,—I can approximate the day, I should say about a month after the date of the lease. When I got over there I saw the property piled in parts of the building leased by this company, bearing our signs, with the card signs on the back and board signs depending from the ceiling, and what we know as metal signs attached to the wall. We had a man over there, but not at the time I was there. I hardly want to say that I mean that this as I have described as seen constituted our possession, cannot quite say what I mean unless you allow me to say that certain things have been done, having been done on my direction, previous to that, and being there and finding it done as I had directed. I found those things there as I have indicated. Suppose I should be obliged to say yes to your question that that is all I have seen of my own knowledge about the possession. The first time after August 31, 1900, that I visited the premises must have been early in the month of October, possibly in September. Have no means of fixing the date definitely; it was within a month or six weeks after the date of the lease. I then visited the second and third floors, and found on those floors what I would call piles of seed, meaning by that a series of bags piled upon each other in rows, a number of these bearing tags of the National Storage Company and carrying above it a sign indicating the division and the section. The building is known as mill construction, meaning that the timbers are all exposed. In place of it being covered as it is here (in this room) the beam is in the building,—it is like a barn, and the part of the building which we then occupied is divided by joists, which are really pillars to support the weight of the load above. Those posts are, I should guess, twelve or fifteen feet apart; cannot say definitely, and between those posts are hung large wooden signs, bearing on their face, out from the wall, the division letter and the section number; the division meaning the floor, A, B, C, D, E, F, G, whatever it might be, the number indicating the section, preceded with the word "Sec." Am testifying as to what I found at the time I was there, as to the second and third floors as they were at that time. Under our contract with Mr. Rodgers he furnished the wooden signs that

I have mentioned for numbering the sections, and the letter follows the sections. The signs I speak of are the abbreviation of the word division and of the word section. For instance, "Div." meaning division, and "Sec." for section; but I am not quite clear as to that; each floor bore a separate letter, the letters were very large; have not been there since, and did not tax my mind with it, but my recollection is that the letter B was present, or A, whatever it was, preceded with the abbreviation "Div." and the number was preceded with the abbreviation "Sec."; that is my best recol-
30 lection. The number related to a subdivision of the floor, with reference to walls and pillars. There were as high as thirty on a floor. That was the usual space between the pillars. There was no fence between those pillars. There was simply a notation to indicate a separate section hanging from the ceiling between the pillars, I should think midway between the pillars; cannot say. They were as high as the ceiling, less the width of the sign. Should say the ceiling is as high as the wall of this room (referring to the referee's court room) perhaps, taking out the joists that are
31 exposed in the room. I should think the signs are 12x15 or 10x12 inches. There were goods there on those floors at that time. They were marked with what we call a board tag, meaning a pasteboard sign, "National Storage Company," upon the front of each pile. Perhaps I can illustrate it better in this way: The bags of seed are piled in a series of piles like that from the ceiling (indicating), end to end and side by side. If we are looking from the front they are piled in two rows. The joint was broken with a pile of bags like that piled up. Upon those bags piled in front were those signs, one for each pile. There was a sign as large as I hold in my hand on the head of each of those piles of bags. I have
32 no means of knowing that the one I hold in my hand is an original or a copy, not having seen from where this came, but they were in no respect different as to the printing matter that is on there, but identically the same as the one I hold. Those tags are put up by our company on our property. The writing in such cases is filled in almost always by the employee of the party on the premises. Mr. Rogers' man would very likely do the writing, but he would not put up the tag. Our custodian, I think, put up the tag at the time of taking the property.

The REFEREE: Did you have any custodian over there?

A. No, sir. Well, yes, yes and no both. If you mean had we a custodian who remained there each hour of the working day,
33 or twenty-four hours, night and day, or day even, we had not. If you mean had we a custodian who went there and took possession of the property, and inspected it, and looked over the premises to see that it was safe, in that sense we had a custodian. We

had a man go over there. I have the cards that were on the property, not the cards that were on at the time that I was over there unless the stock has remained in store up to the present time.
34 (Witness produces card.) That is one tag that was on at the time when I was over there. The tag reads as follows: "No disturbance permitted while this card is posted. Warehouse card National Storage Company, date August 31, 1900, Warrant No.., Lot No. 6, Section No. 6, Pile No.." Here is the number of each pile then filled in in large type, "225 bags of timothy." I wish to say that this form is not quite the same as the form used two or three months later, although it is the same in substance. We
35 changed the order of the blanks so as to keep more space for filling in. The date on that card is August 31, 1900. This was the form of one of the tags, and all the other cards that were on the piles there at that time were identical with this in the printed portion. At that time, or about that time, we had these printed, and I would not be sure but that they may have been intermingled. We would not throw away the old form, as the other form simply changed the location of some of the places, giving more space for filling in. I would not be able to swear that all of the tags were of that particular printed form, but they are all either of that form or the one which you have shown me a short time before. I have one of the other forms that was there. I think there is not any of the original cards of that other form that was there when I visited the place in the last part of September, 1900. I was only upon the second and third floors. I do not know that I can determine by inspecting this card whether there is any card of the other form now in existence that I know of that I could find and produce
36 that was on the piles when I visited the warehouse. That (referring to card handed witness) is the other form that I speak of. It reads as follows: "National Storage Company, Warehouse No.: This card must not be disturbed or obscured. Date....., Lot No.., Section No. .., number in pile blank, and three blanks for filling in. The whole number in lot and a blank space." The cards that I saw there in the latter part of September, 1900, were filled in. The card which I exhibited is the one which was then upon the pile, which I saw filled in as it is now, but the form I last read were also filled in in the same manner as the other forms.

Q. Indicate what, if anything?

(Objected to; objection sustained.)

37 WITNESS: The contract was signed two days prior to the signing of the lease. Upon the date of signing the lease the National Storage Company issued to the order of Alexander Rodgers its ten warrants, numbered consecutively from 8401 to

8410. We have all of those warrants excepting two. We have warrants numbered 8401, 8402, 8403, 8404, 8405, 8407, 8409, 8410. I have those before me (producing same).

(Objected to as immaterial.)

The REFEREE: I think one might be read as a sample, and say that the others were the same form, and numbered so and so.

WITNESS: There are two forms. The earliest warrant issued, as filled out, was signed by the president and secretary and treasurer, and has the seal of the company affixed thereto. It reads as follows:

"250 bags of timothy seed, said to weigh 31,751 pounds, Warrant No. 8401, Lot No. 1, National Storage Company, Office 217 First National Bank Building, Chicago, hereby acknowledges to have received two hundred and fifty (250) bags timothy seed, said to weigh 31,751 pounds, contained in Div. B, Sec. 1, fifth floor,
39 at its warehouse premises No. 281, located at 220 to 230 Johnson Street, Chicago, Illinois, and will surrender the same to the order hereon of Alexander Rodgers upon payment of charges and delivery of this warrant, at its office in Chicago, duly endorsed.

It is agreed that this company is not responsible for loss or damage to property occasioned by fire, water, leakage, vermin, ratage, shrinkage, accidental or providential causes, riot or insurrection, frost or change of weather, or or from being perishable, while in storage, and that this company shall, in the custody of the above property, be the agent of the holder of this warrant.

Record Book C, page 233. Storage and charges as per contract on file with this company.

CHICAGO, August 31, 1900.

NATIONAL STORAGE COMPANY,
C. B. BOUTON, *President.*
WALTER TOD, *Treasurer.*

Incorporated in 1886 under the laws of the State of Illinois. Seal of the National Storage Company,
Chicago, Illinois."

WITNESS: The next number in order is 8402. It differs from the last only as to the filled in matter. It reads, "250 bags of timothy seed, said to weigh 31,071 pounds, Lot No. 2, contained
40 in Div. B, Sec. 2, fifth floor." The balance of the filled in matter is the same. The next warrant is 8403. The filled in portion is "250 bags of timothy seed, said to weigh 30,963 pounds, contained in Div. B, Sec. 3, fifth floor." Balance of written part the same. The next is 8404. "250 bags timothy seed, said to weigh 32,033 pounds. Lot No. 4, contained in Div. D, Sec. 4, third floor." Balance of written in part the same. Next number is 8405, which

is not in our possession, because it is still outstanding. And 8406 is also outstanding. The next one we have is 8407, for "250 bags of timothy seed, said to weigh 30,065 pounds, Lot No. 7, contained in Div. D, Sec. 7, third floor." Remainder of filled in part the same as the previous ones. Warrant 8408 is also outstanding. The next we have is 8409, "238 bags of timothy seed, said to weigh 29,810 pounds, lot No. 9, contained in Div. D, Sec. 9, third floor." Remainder of filled in portion the same as previous ones. 8410 is the next one, "250 bags of timothy seed, said to weigh 32,300 pounds, Lot No. 10, contained in Div. D, Sec. 10, third floor." Remainder of filled in part same as
41 previous ones. That is the entire number of warrants issued on that date. All but two of the ten warrants issued upon that date were canceled. Those two were 8406 and 8408. Those are outstanding. Under this contract a paper called an application for storage warrant and valuation memorandum preceded the issuance of the first warrant. I have these papers before me; they were signed by Alexander Rodgers.

(Objected to by receiver as incompetent and immaterial; objection overruled.)

42 Mr. HECKMAN: I will read only one of these applications for storage warrants and valuation memorandum in evidence as Exhibit C and Exhibit D, respectively, in order to shorten it.

WITNESS: This application handed me covers the ten warrants first issued; the valuation also covers the same ten warrants. With reference to the facts concerning cancellation of the first of the warrants, No. 8401 was returned to the office of the Storage Company duly endorsed by Alexander Rodgers, returned October 15, 1900, surrendered by Rodgers, and at the time of its surrender and cancellation the company issued its release. I have not
43 that release, but I can procure it in a very few minutes. Referring to the release that was issued at the time of the cancellation of the warrant, the custodian's name is in there. We sent the custodian from our office.

Release offered in evidence, marked "Exhibit E," as follows:

EXHIBIT E.

RELEASE.

NATIONAL STORAGE COMPANY,

Warrant released in full hereby as follows: No. 8401 to the order of Alexander Rodgers issued for 250 Bags Timothy Seed.

(Releasing.)

Number A. 341. 250 Bags Timothy Seed. Division "B." Lot No. One. Section One. 5th Floor.

OCT. 15, 1900.

To E. C. Rand, Inspector, Custodian of Warehouse Premises No. 281, at Chicago, Illinois,

The National Storage Company has this day received and canceled its Storage Warrant No. 8401 and all of the property covered thereby is hereby released as follows:

Two hundred and fifty (250) Bags Timothy Seed said to weigh 31,751 Pounds Contained in Division "B", Section One (1), Fifth Floor. (5th).

Upon presentation by the proper parties, of this Company's removal permit of even date and Warrant Number duly endorsed, you are authorized and directed to permit the removal of the property hereby released, removing such locks, seals, cards, signs and other marks, evidences, methods and means of possession and security as relate exclusively to the same and such others temporarily as shall be found necessary to permit the removal of the released property, but only at and during the time of its actual removal, which must be under your supervision. Before the property hereby released is removed, the Receipt hereon must be duly signed by Alexander Rodgers.

NATIONAL STORAGE COMPANY.

CHICAGO, Ill., October 15th, 1900.

WALTER TOD, *Treas.* By C. B. BOUTON, *Pres't.*

Chicago, Ill., October 15th, 1900, Received this day of the National Storage Company the property hereintofore released.

ALEX. RODGERS.

Property hereby released duly delivered.

E. C. RAND, *Custodian.*

Custodian will please have within receipt signed, certify to delivery of property and return this at once to this office.

Office, 217 First National Bank Building, Chicago, Illinois.

44 WITNESS: That release was directed to E. C. Rand, inspector, an employee of the company. Similar releases were issued to all of the other ten except the two warehouse receipts outstanding. At the time I visited the warehouse in the latter part of September,

1900, there were several cards upon the piles of property covered by our storage warrants on the second and third floors, but I am not able to give the number. There was one card upon each pile that I saw. They were attached to one of the tiers of bags across the front of the pile, a little below the level of the eyes, about the level of the shoulder. I did not notice figures or letters upon
45 the cards other than those I mentioned. None of the cards I examined failed to state the number of bags in the pile. I was there probably twenty minutes or half an hour at that time; twenty minutes probably. Alexander Rodgers signed the applications on which these various warehouse receipts were issued in each instance, and also the valuation memorandum. I have before me the other warehouse receipts issued to Alexander Rodgers and
46 canceled that have been issued subsequent to this first instalment, with the exception of the outstanding warrants now in force. I think about seventy-five or eighty warrants were issued subsequent to the ten I have testified to. Twenty-two of those seventy-five or eighty are still outstanding. I have the applications and the valuation memoranda upon which the twenty-two outstanding warehouse receipts were issued. (Witness produces
49 same.) The application, marked "Exhibit C," relating to the oldest numbered outstanding warrant, reads as follows:

"APPLICATION FOR STORAGE WARRANT. To the National Storage Company, Chicago. Chicago, Illinois, August 31, 1900. For the purpose of obtaining your storage warrants, the subscriber has placed in your warehouse premises No. 281, located at 220 to 230 Johnston street, Chicago, Illinois, the following property: 225
50 bags timothy seed, weight 29,751 pounds, marked T. 66795, Div. D, Sec. 6, Floor 3, Lot No. 6, Warrant No. 8406. 250 bags timothy seed, weight 30,625 pounds, marked T. 61974, Div. D, Sec. 8, Floor 3, Lot No. 8, Warrant No. 8408.

It is hereby certified that this property belongs to the undersigned, is in good mercantile condition, and free from lien or encumbrance.

Said storage warrants to be issued to the order of Alexander Rodgers, in accordance with the proposal for warehousing con-
51 tract dated August 25, 1900, of which this application and the valuation memorandum bearing the same warrant numbers and of even date herewith is hereby made a part.

ALEXANDER RODGERS."

Upon the right-hand margin is the following:

"Inventoried by E. C. Rand."

WITNESS: That is "Exhibit C" I have been reading from.

The valuation memorandum testified to by the witness, marked "Exhibit D," is as follows:

EXHIBIT D.

VALUATION MEMORANDUM.

CHICAGO, August 31st, 1900.

NATIONAL STORAGE COMPANY,
Room 217 First Nat'l Bank Bldg., CHICAGO.
To Mr. Alexander Rodgers,
#220-#230 Johnson St., Chicago, Ill.

Entered
W. L. Fo. 100

NUMBERS. Lot.		DESCRIPTION OF PROPERTY.	Rate	MARKET VALUES. Value of each item.	MARKET VALUES. Values covered by each warrant.	Warrant Number.
1	250	Bags Timothy Seed, 31,751			$1,206.54	8401
2	250	" " " 31,071			1,180.70	8402
3	250	" " " 30,963			1,176.59	8403
4	250	" " " 32,033			1,217.25	8404
5	250	" " " 30,924			1,175.11	8405
6	225	" " " 29,751			1,130.54	8406
7	250	" " " 30,065			1,142.47	8407
8	250	" " " 30,625			1,163.75	8408
9	238	" " " 29,810			1,132.78	8409
10	250	" " " 32,300	380		1,227.40	8410

The property specified on the above memorandum which for purposes of warehousing has this day been placed in the possession of the NATIONAL STORAGE COMPANY, by the subscriber, is the same as that entered on application for Storage warrant of corresponding warrant number, and even date herewith, and the undersigned hereby guarantees that the responsibility of the Storage Company, in event of loss of any property covered by warrants enumerated, shall not exceed the values given above, unless, before such loss occurs, notice of change in value shall have been given to and acknowledged by said Storage Company.

(Signed) ALEX. RODGERS.

WITNESS: (continuing): The application for the warehouse receipt next in number is warrant No. 8437. I do not
52 know whose signature it bears. That is the same in form as the one I have read.

Mr. HECKMAN: We won't stop to read these, but offer them in evidence. We will just simply mark them and offer them. I will read off the numbers. We have already called 8406 and 8408.

The following applications for numbered warrants were marked exhibits, as follows:

Exhibit F—8437, 250 bags timothy, 31,230 pounds, in Div. B, Sec. 3, date September 10, 1900.

Exhibit G—8489, 250 bags timothy, 30,066 pounds, in Div. D, Sec. 1, date October 22, 1900.

Exhibit H—8928, 250 bags timothy, 31,041 pounds, in Div. D, Sec. 3, date November 15, 1900.

Exhibit I—9067, 250 bags timothy, 32,839 pounds, in Div. E, Sec. 8, date December 14, 1900.

Exhibit J—9086, 250 bags timothy, 32,127 pounds, in Div. E, Sec. 5, date December 17, 1900.

Exhibit K—9118, 247 bags timothy, 31,103 pounds, in Div. D, Sec. 7, date December 22, 1900.

Exhibit L—9154, 250 bags timothy, 30,549 pounds, in Div. B, Sec. 4, January 5, 1901; 9155, 250 bags timothy, 30,421 pounds, in Div. B, Sec. 5, date January 25, 1901.

Exhibit M—9195, 351 bags buckwheat, 42,367 pounds, in Div. B, Sec. 25, date January 18, 1901.

Exhibit N—9224, 250 bags timothy, 31,892 pounds, in Div. B, Sec. 30, date February 19, 1901; 9227, 250 bags red top, 24,969 pounds, in Div. B, Sec. 7, date February 19, 1901.

Exhibit O—9244, 250 bags timothy, 31,295 pounds, in Div. F, Sec. 4, date February 23, 1901.

Exhibit P—9246, 322 bags, timothy, 34,087 pounds, in Div. F, Sec. 6, date February 27, 1901.

Exhibit Q—9348, 70 bags alsike, 10,080 pounds, in Div. B, Sec. 12, date March 29, 1901.

Exhibit R—9425, 250 bags Hungarian, 36,719 pounds, in Div. D, Sec. 10, date May 1, 1901; 9426, 244 bags Hungarian, 34,906 pounds, in Div. E, Sec. 9, date May 1, 1901; 9427, 80 bags clover, 11,721 pounds, in Div. B, Sec. 8, date May 1, 1901.

Exhibit S—9436, 221 bags buckwheat, 26,815 pounds, in Div. B, Sec. 19, date May 7, 1901; 9437, 250 bags timothy, 29,341 pounds, in Div. E, Sec. 6, date May 7, 1901; 9438, 250 bags timothy, 31,326 pounds, in Div. E, Sec. 4, date May 7, 1901.

Said Exhibit F, consisting of Application for Warrant No. 8437, is as follows: (All of the other of said exhibits being precisely the same in form as said Exhibit F, and differing only as to the date, property and location of the same described therein).

EXHIBIT F.

Application for Storage Warrant.

CHICAGO, Ill., Sept. 10th, 1900.

To the NATIONAL STORAGE COMPANY,
Chicago.

For the purpose of obtaining your Storage Warrants the subscriber has placed in your Warehouse premises No. 281 located at Nos. 220-230 Johnson St., Chicago, Ill., the following property, to wit:

250 Timothy Seed 31230 R N L B 3 5 20 8437

It is hereby certified that this property belongs to the undersigned, is in good mercantile condition and free from lien or encumbrance. Said Storage Warrants to be issued to order of Alex Rodgers, in accordance with Proposal for Warehousing Contract dated Aug. 25, 1900, of which this Application and the Valuation Memorandum bearing same Warrant Numbers and of even date herewith is hereby made a part.

ALEX RODGERS.

Upon the right-hand margin is:
"Inventoried by E. C. Rand."

WITNESS: The application marked "Exhibit C" was signed by Alexander Rodgers. I do not know by whom applications marked Exhibits F and G were signed. Exhibits H and I were signed by Alexander Rodgers. Those that I now read were all signed by Alexander Rodgers, Exhibits J, K, L, M, N, O, P, Q, R and S. Those applications for warehouse receipts were in each instance accompanied by valuation memoranda. (Witness produces
54 same.) Exhibit D was signed by Alexander Rodgers.

Valuation memoranda were offered in evidence and marked Exhibits T to Z, both inclusive, and AA to HH, both inclusive.

Said Exhibit T is in words and figures as follows:

(The balance of said exhibits being in precisely the same form as said Exhibit T, except as to date, and as to the description and location of the property therein.)

EXHIBIT T.

VALUATION MEMORANDUM.

CHICAGO, Sept. 10th, 1900.

NATIONAL STORAGE COMPANY,
Room 217 First Nat'l Bank Bldg., CHICAGO.

To Alex Rodgers,
#220-#230 Johnson St., Chicago.

Entered
W. L. Fo. 100

NUMBERS. Lot.		DESCRIPTION OF PROPERTY.	Date.	MARKET VALUES. Value of each item.	MARKET VALUES. Values covered by each warrant.	Warrant Number
19	250	Bags Timothy Seed,	31,446			8436
20	250	" " "	31,230		$1,186.74	8437
21	238	" " "	30,181			8438
			92,857	$3.80	$3,528.56	

The property specified on the above memorandum which for purposes of warehousing has this day been placed in the possession of the NATIONAL STORAGE COMPANY, by the subscriber, is the same as that entered on application for Storage warrant of corresponding warrant number, and even date herewith, and the undersigned hereby guarantees that the responsibility of the Storage Company, in event of loss of any property covered by warrants enumerated, shall not exceed the values given above, unless, before such loss occurs, notice of change in value shall have been given to and acknowledged by said Storage Company.

(Signed) ALEX. RODGERS.
H.

WITNESS: I do not know the signatures to Exhibits T and U. The following were signed by Alexander Rodgers: V, W, X, Y, Z, AA, BB, CC, DD, EE, FF, GG and HH.

Cross-Examination by Mr. Kerr.

I have testified that the National Storage Company issued certain warrants or warehouse receipts and that those were issued after lodging with our company the applications and valuations

which have just now been introduced in evidence. Warehouse receipts numbered 9154, 9155, 9224, 9227 and 9436, handed me, are all warrants about which I have just now testified. They were
55 executed by C. B. Bouton, President, and Walter Tod, Treasurer, of the National Storage Company. That is the seal of the company attached to the papers. They were executed *ex-officio* by the National Storage Company by its officers. 9154, 9155 and 9224 are endorsed by Alexander Rodgers. I believe 9227 also is. The signature is very imperfect. 9436 is also his endorsement.

Warrants offered in evidence by Mr. Kerr, and marked Exhibits R-1, R-2, R-3, R-4 and R-5.

Said exhibits were on the same printed blank and executed in the same form as that offered in evidence by the First National Bank, Exhibit I-1, record page 104. The dates, quantities of seed, lot number, division and section in the warehouse, 220 to 230 Johnson street, being as follows:

Exhibit R-1. Storage Warrant No. 9154, 250 bags timothy seed said to weigh 30,549 pounds, lot No. 43, Division B, Section 4, fifth floor, dated January 5, 1901.

Exhibit R-2. Storage Warrant No. 9155, 250 bags timothy seed, said to weigh 30,421 pounds, lot No. 44, Division B, Section 5, fifth floor, dated January 5, 1901.

Exhibit R-3. Storage Warrant No. 9224, 250 bags timothy seed, said to weigh 31,892 pounds, lot No. 50, Division B, Section 30, fifth floor, dated February 19, 1901.

Exhibit R-4. Storage Warrant No. 9227, for 250 bags red top seed, said to weigh 24,969 pounds, lot No. 53, Division B, Section 7, fifth floor, dated February 19, 1901.

Exhibit R-5. Storage Warrant No. 9436, 221 bags buckwheat seed, said to weigh 26,815 pounds, lot No. 62, Division B, Section 19, fifth floor, dated May 7, 1901.

Each warrant was issued to and in the name of said Alexander Rodgers and was by him endorsed in blank.

WITNESS: These are the warrants that I have testified to as having been issued upon the applications and valuation memoranda testified to.

56 *Cross-Examination by Mr. Paden.*

I never had any keys to any of the rooms of those premises, I never examined what was in any of the bags on which we issued warehouse receipts. Was there in the latter part of September
57 and saw certain bags, upon one of which a certain tag of ours was placed. I did not examine what was in any of those bags. It is not the fact that all we ever did about taking actual physical

possession of the property was to put a small tag, about four by six inches upon one of the bags in each pile. Our inspectors gave personal attention to and inspected the property. I do not know whether he looked inside the bags. Our inspector went there, put
58 one of our own tags on one of the sacks in each pile, accepting possession, and marked it. He went into the premises and inspected the stuff, counting the sacks, and seeing them, and taking possession of the premises. I mean by taking possession of the premises that under our directions one of our employees went into the premises, and going in, placed our signs upon the property. The premises were not in the possession of Alexander Rodgers, and did not remain in his possession. I do not know who carried the keys to the premises; I know that I did not. I know there were other means of access to the building than the doors to which
59 Alexander Rodgers had keys. That was from another part of the same building, of which the General Electric Company were in possession as tenants. We left our custodian in possession there for short periods daily sometimes. I should say that very likely all he would do would be to remain there long enough to count the seed. The first step in the issuing of our warehouse
60 receipts was the proposal contract. After the contract called a lease has been signed, the first step is the application for a storage warrant. Our warehouse premises, No. 281, located at 220 to 230 Johnson street, are not the same premises in which Alexander Rodgers is conducting his business. The National Storage Company has charge of those premises in the way in which I have heretofore indicated. I presume our inspector examined the contents of the bags described in the application for a storage warrant. I never was present when he inspected the stuff. We also
61 get a valuation memorandum before the warehouse receipt is issued. Upon the day that this receiver was appointed our inspector was in the premises, I think after the receiver's appointment. He can tell best himself. Yes, he was there before; he
62 was there the day before, and I think on that day; possibly before, but I know he was there in the afternoon. I sent him over there after I heard the receiver had been appointed.

Re-direct Examination.

I have been asked if all the possession I took was the notice that was put on the bags. That was not all the possession we took. I testified that those were upon the premises. I testified that in addition to what we called a board sign there was also a tin sign and metal sign. The reading on the tin sign was, "This property controlled by the National Storage Company, Chicago, as a public

warehouse," and the warehoused premises No. ————. That (indicating) is one of the signs; they are all identical in size.
63 I do not recall whether any of these were placed on the second floor. I saw probably two. I do not recall whether I saw on both floors or not, I was not looking for that.

Cross-Examination by Mr. Eschenburg.

The day that I went to look at that property I went through the second and third floors. I do not know whether I saw any other property stored there in addition to the piles which were
64 marked with the tags. I did not see all the piles that were marked. All the piles I found were marked with those tags. There was not, to my knowledge, considerable property there in addition to them. I cannot swear that it was not so. I do not know, as a matter of fact, that Rodgers had property of his own on the second and third floors during the time since we had been storing there. I can swear that every pile that I examined there on that day had one of those tags attached to it. I had no purpose in examining them at that time; went there to examine other
65 property. My purpose in going there was to inspect in one lot of seed. I inspected that, did not open the bags. I simply counted the bags and then put a tag on one of them. Did not put any marks on the bags otherwise. We did not weigh the seed when we inspected them before we issued a certificate. We did not rely entirely upon Rodgers' statement with reference to the contents and weight of the bags. We had no interest in weighing the bags. The weight is stated in these warrants as "said to weigh." In issuing our receipts we simply took the statement as to what the bags
67 were said to weigh from what he told us. When the storage receipts are finally canceled we send our inspector to the premises to remove the signs and deliver the stuff over to Rodgers, or to his employes. I mean by delivering, surrendering it to him. I never delivered any myself; I have never seen any of my employes deliver any. I know those are the instructions that are given. E. C. Rand is the inspector, whose duty it is to look out for these premises for us. He is not the only one who has taken care of our property there ever since we entered into this contract. My brother was at one time an inspector there, and I think some one else
69 was; I do not recall the name. Rand has attended to it, not exclusively at all, but principally all the time. He has others that he has attended to. I cannot tell how many. I should judge a dozen, not more than that. They are located in various parts of the city.

71 Our company has no warehouse of its own to store goods. We have no premises of our own. We are occupying as tenants under leases similar to the one introduced in evidence. The No. 281 in the application for storage warrants as the number of the warehouse premises is an arbitrary number, being the consecutive number of our records. When a warehouse warrant is brought into us, or surrendered or canceled by us, we issue the release that I have referred to. The release is not a delivery of the property; the release is authority to our custodian to surrender.

72 We never deliver these releases to the party who originally obtained the receipts. That is simply authority to our custodian to deliver possession of the property. I do not think the employes of Rodgers had access to the portion of the building

73 claimed by the Storage Company. There was nothing to prevent their going into that portion by reason of any custodian. The premises of the Storage Company were not separated by a partition from the premises occupied by Rodgers. He had access to his portion of the building and all other portions of the building. Alexander Rodgers, or his employes, would remove the property from the portion of the building claimed by the Storage Company after the storage receipts were canceled. Neither Alexander Rodgers nor any of his employes ever asked our permission to go in the part of those premises occupied by us. There was nothing to separate the north half from the south half of the third story. We leased one-half there. The communication between the north half and the south half was uninterrupted.

Re-direct Examination.

There was no partition between or anything of that kind. When I said a while ago Rodgers had no access to our part

74 of the building I meant that they might go, that it was not an utter physical impossibility for them to go upon it, but they had no permission to go upon it. I said, in reply to a question by Mr. Wyeth, that those premises leased to us constituted our warehouse No. 281, and it was so indicated on all the papers and tags, and where No. 281 appears on those papers it has reference to the warehouse number. When I answered Mr. Eschenburg's interrogatory and stated that the number of the section, division, and the number of bags in a pile were placed on the card, but no other identification, I did not mean to exclude the words "National Storage Company" that are on the cards in evidence. I understood him to refer to the entire card, and to all the signs. Those signs

75 were not placed anywhere except in the room where this stuff was. We did not put our signs down-stairs in the office. They

went up only in the part of the premises that were covered by our lease. We had one or two signs there on each floor, I think usually two. I say I saw more than one; I saw two or more upon the second and third floors.

Cross-Examination by Mr. McNab.

We rented all of the second floor under this lease. We did not sublet to Rodgers on the second floor. He has a right to have that for the use of his office. It is a fact that across the front of the building on the second floor there is quite a section of that floor that is used by Rodgers.

ALEXANDER RODGERS, a witness sworn on behalf of the National Storage Company, testified as follows:

I know by whom Exhibits T and U were signed. They were signed by James W. Hogg, my book-keeper at that time, by my authority. He also signed the two exhibits G and F by my authority.

May 23, 1901.

HOLMES HOGE, a witness sworn on behalf of the First National Bank, testified as follows:

79 I am assistant cashier of the First National Bank of Chicago; have been in that position something over ten years. Am acquainted with the bankrupt, Alexander Rodgers. He was a customer of the First National Bank of Chicago prior to his failure; was a borrower at that time. In the making of loans I generally attended to these transactions with Mr. Rodgers. Mr. Rodgers is indebted to the bank now. The bank made him a loan on or about November 1, 1900. I attended to the matter. Rodgers either called in person or sent in the note that I hold in my hand for $2,300. It was secured by two warehouse receipts of the National Storage Company, numbered 8498 and 8499, each for
80 250 bags of timothy seed, aggregating 63,113 pounds. The value placed thereon by Mr. Rodgers was $2,876.97. I made him a loan then, as evidenced by these documents. That is Alexander Rodgers' signature. The date is November 1, 1900.

Mr. PECKHAM: The witness is reading from a memorandum here. I will put that in, too.

WITNESS: That was a memorandum that was sent down
81 with the note. On the strength of that I made the loan.

(Note dated November 1, 1900, for $2,300, offered in evidence as "Exhibit 100 (Exhibit A) to Hoge's evidence.")

(Objected to as immaterial and indefinite; objection overruled.)

Said note is marked "Exhibit 100 Hoge" and "Exhibit A Hoge," and is as follows:

3480 $2,300.00

Revenue Stamp, 44 cts.

CHICAGO, NOV. 1st, 1900.

On demand after date I promise to pay to the order of the First National Bank of Chicago, at their office, two thousand three hundred dollars, for value received, with interest at the rate of 6 per cent. per annum, after date, having deposited with said Bank as collateral security, for payment of this or any other liability or liabilities of me to said Bank, due or to become due, or that may be hereafter contracted or existing, howsoever acquired by said Bank, the following property, viz.: Warehouse Receipts, the market value of which is now $2,877.00; with the right to call for additional security should the same decline; and on failure to respond, this obligation shall be deemed to be due and payable on demand, with full power and authority to sell and assign and deliver the whole of said property, or any part thereof, or any substitute therefor, or any additions thereto, at any Brokers' Board, or at public or private sale, at the option of said Bank, or its assigns, and with the right to be purchasers themselves at such Brokers' Board, or public sale, on the non-performance of this promise, or the non-payment of any of the liabilities above mentioned, or at any time or times thereafter, without advertisement or notice. And after deducting all legal or other costs and expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales so to be made, to pay any, either or all of said liabilities, as said Bank, or its President or Cashier shall deem proper, returning the overplus to the undersigned. In case of the insolvency of the undersigned, any indebtedness due from the legal holder hereof to the undersigned may be appropriated and applied hereon at any time, as well before as after the maturity hereof.

ALEX. RODGERS.

Endorsed on said note is the following:
Int. chgd. to Nov. 30, 1900.
Int. chgd. to Dec. 31, 1900.
Int. chgd. to Jan. 31, 1901.
Int. chgd. to Feb. 28, 1901.

Int. chgd. to Mar. 31, 1901.
Int. chgd. to Apl. 30, 1901.
Paid 5-7-01 $1,700.

WITNESS: The paper handed me, purporting to be a letter from Alexander Rodgers, dated November 1, 1900, from which I was reading a moment ago, was received by the bank, to my knowledge, at the same time the note was presented that I have testified about. It came with the note.

Said writing offered in evidence.

(Objected to; objection overruled.)

The writing is marked "Exhibit 101 Hoge" and "Exhibit B Hoge," and is as follows:

1, CHICAGO, Ill., Nov. 1, 1900.

First National Bank, City.

Memo of Warehouse Receipts herewith:

National Storage Co.,

No. 8498	250 bags	Timothy seed	32119
8499	250 "	" "	30994
			63113 at 4.40 2,876.97

Yours truly,

ALEX. RODGERS.

Dic. A. R. E.

WITNESS: The First National Bank is the holder of the documents handed to me, purporting to be notes of Alexander Rodgers, one dated December 24th for $3,500; one dated January 5, 1901, for $2,250; one dated January 21, 1901, for $4,500; one dated February 27, 1901, for $1,200, and one dated March 14, 1901, for $1,200; all payable on demand to the order of the First National Bank of Chicago. I know that the loans for these several amounts were made by the First National Bank to Alexander Rodgers
83 on the dates of the notes respectively. The signatures on the notes are those of Alexander Rodgers. I have seen him write his name. Those loans were made upon warehouse receipts as collateral security therefor. I have the warehouse receipts with
84 me. There are some of them that are not here; either the original receipts or the receipts received in substitution of the original receipts are here.

Q. Produce, if you can, the warehouse receipts which the bank holds as collateral security for these notes.

(Objected to; objection overruled.)

WITNESS: The warehouse receipts that were originally
86 pledged to November 1, 1900, for $2,300 are not now in the

possession of the bank. It is customary with the bank, in transactions of this nature, where men handle goods of this character, that they do not wish to pay the notes as the collaterals are taken from the bank, and the bank receives in lieu of the original securities pledged what they consider a good and substantial substitute, and in this case, as in all other cases connected herewith, we did receive at the time of surrendering any of the original securities either money or what we considered an equivalent of money. If money, the amount is endorsed on the paper.

(Motion to strike out the answer as not responsive, and also as a conclusion; overruled.)

WITNESS: I cannot tell now what was substituted for the original receipts in this particular instance, but the books of the bank will show. I can ascertain by consulting those books. The note of December 24, 1900, for $3,500. I hold in my hand
87 Warrant No. 9118 of the National Storage Company for 247 bags of timothy seed, weighing 31,103 pounds. This warrant is one of the three that were pledged as security for the pay-
88 ment of this note of $3,500, dated December 24th. I mean by "pledged as security" that it was brought into the bank at the time the note was, and we accepted it as security for the payment of the note. This one is as part security; there are two others; we have not the two others. I did not find them among the documents now held by the bank. The next note of January 5, 1901, for $2,250, neither one of the original warehouse receipts are in the possession of the bank. The next note for $4,500, dated January 21, 1901; there were originally five warehouse receipts pledged with the bank as security for this note.

(Motion to strike out the answer as a conclusion; overruled.)

89 WITNESS: As to the word "pledged," that is common language in the bank. There were originally five warehouse receipts of the National Storage Company delivered to the bank at the same time that the note was presented and by the same party. The bank only holds one of the original receipts delivered to the bank at that time; that is, No. 9195, for 351 bags of buckwheat. The next note is dated February 27, 1901, and is for $1,200. At the same time this note was brought to the bank, and by the same party, there was also brought to the bank Warrant No. 9246 of the National Storage Company for 322 bags of timothy seed.
90 This warrant was offered as collateral security for the payment of this note, and by the bank was accepted as collateral security for the payment. It is numbered 9246. That is the only

one with respect to the note. The next note is dated March 14, 1901, for $1,200. It was offered for discount, or brought to the bank by either Rodgers or his representative at the same time the Storage Company Warrant No. 9338 for 250 bags of timothy was presented and offered as collateral security for the payment of the note, and by the bank this collateral security was accepted, and the advance of $1,200 was made to Alexander Rodgers. The original warrant is not in our possession.

(Motion that the last answer be stricken out, as to the contents of the warrant.)

91 The MASTER: Let that part of the answer be stricken out describing the contents.

WITNESS: I have identified only a portion of the warrants handed me as warrants which were originally pledged when the loans were made. The bank holds the remainder of these
92 warrants as well. I cannot give the date when the bank re-
94 ceived them, but they were received from Alexander Rodgers. I don't remember the conversation at the time these warrants last referred to were delivered by Rodgers and received by the bank. The fact is, the officers of the bank do not make these changes and substitutions; it would be a physical and practical impossibility; there are hundreds of them in the course of a day. To go back over months and remember a conversation to consider what we considered, that is a trivial matter to me. I mean by that, of not very much moment, not a very large amount of money in the transaction—they could not remember, but I know this, that whatever warrants were brought and are now brought to the bank—

95 (Objected to as not responsive; overruled.)

WITNESS: I know that these warrants that are lying here now were received by the bank either as original security for the money advanced to Rodgers, or as substitutes for the original warrants that he gave to the bank, and the bank only received
96 such of those warrants as were substitutes for the original warrants with the express understanding and information from Rodgers that they were fully equal in value to the original warrants.

(Motion to strike out the answer; denied.)

WITNESS: Each and all of these warehouse receipts were deposited with the bank prior to May 8th, the date when Alexander Rodgers became a bankrupt.

Cross-Examination by Mr. Paden.

When the bank surrendered the original warrants that had been delivered to them, they were either delivered to Rodgers
97 personally or to his authorized agent. They were never in any instance delivered to the National Storage Company or any of its officers unless by express authority of Rodgers. Alexander Rodgers was the only party that we dealt with in the transaction. When warrants were brought in for substitution I did not attend to the substitution myself. We have in the bank a clerk known as the collateral clerk, who handles all the collaterals, and authority is given to him to make substitutions of that kind, to receive and deliver collaterals. We have no dealings with the National Storage Company at all; the only recognition that we made of them was in our belief and understanding that we were to receive good security when we received their warrants as collateral. The bank, in receiving these collaterals, never investigated the contents of
98 the bags described in the warrants. I think I personally received all the notes which were delivered to us and which have been introduced in evidence. Each of them bear my mark very clearly. I have the original warehouse receipts in my possession,—in my hand, every time at the time the notes would be delivered. They were delivered in each case with the note. I did not receive the warehouse receipts or certificates bearing date May 1, 1901. They are substitutes. I did not assume they were substitutes.
99 I know it is a fact of record. I do not know it from any conversation with Rodgers or any one representing him. All the information I have on the subject is that derived from the books of the bank, or from clerks in the bank. I cannot tell whether these are all the loans that were made to Rodgers by the bank since the date of the first one; he may have made some that were dated since that. I don't remember having a conversation with Rodgers on May 7, 1901, the day before the failure, and on which date there was a payment of $1,700 endorsed on the $2,300 note. I could not say whether I had any conversation with Rodgers within ten days before the 8th of May. I do not remember seeing him at that time. The endorsement of $1,700 was made by Mr. Blossom, our collateral clerk, who is the authorized man in the bank to receive
100 payment and to make endorsements on notes. I could not say whether I did or did not receive any of those certificates personally at any time except when we made a loan to Rodgers. It may have been that Rodgers or his substitute came to me and that I then gave instructions to the collateral clerk, E. J. Blossom, to make a substitution. None of those certificates were delivered to me after loans were made as security therefor unless they were in the

way of substitutions. The clerk I spoke of was empowered to arrange with him for those substitutions. I could not tell whether I arranged for them or not, do not remember, but the clerk was the authorized party to make the substitutions. He would do so without consulting me. His name is E. J. Blossom. I cannot tell now when the last substitution was made; that can be told, however, fully by the records, by Mr. Blossom.

Examination by Mr. Heckman.

101 I have not with me warehouse receipts numbered 8498 and 8499, issued with the note of November. There is in the neighborhood of $12,000 of the indebtedness which I have testified to of the bankrupt to the bank still unpaid at the present time.

102 Mr. PECKHAM: I would like to say, so the court will understand, that the evidence that I have introduced here of the debt of the bank is only to support the allegation in my answer that the bank has a substantial interest in this. The bank is not named in the petition. It's seed is not identified, and there is nothing in the petition to connect the bank with the case at all, except that we know, as a matter of fact, that all the seed is covered, and that includes ours, and I want to show that we are not parties from the street coming here with no interest, taking up the time of the court. I only want to show that we have a substantial interest.

WITNESS: In reference to the canceled warehouse receipts
103 numbered 8498 and 8499, I can say that these are the same numbers, they are for the same number of bags of timothy seed, they are for the same number of pounds of timothy seed, as the receipts that were received by the First National Bank as collateral security on November 1, 1900, to Alexander Rodgers' note for $2,300. I do not know whether they are the same receipts that were given at that time or not; I should say that they were. Warrant 8498 is for 250 bags timothy, said to weigh 32,119 pounds, in Div. B, Sec. 2; 8499 is for 250 bags timothy, said to weigh 30,-994 pounds, in Div. B, Sec. 1. We have not the certificate No.
104 9338 that was delivered with the note for $1,200, dated March 14, 1901. I see a canceled certificate of that amount, No.
105 9338, for 250 bags of timothy seed. I believe this to be the original certificate that was deposited with the bank as collateral security for that note.

The certificate offered in evidence, marked II, as follows:

(Copy) W'Hse Ldg'r 102 W'hse Rg'ster 295

Valid only when signed by the President or Vice-President, and Secretary or Treasurer and the Seal of the Company affixed hereto

(25 cent Docu-)
(mentary Stamp)

Received WARRANT Number 9338
250 Bags Timothy Seed. Lot No. 57
Said to weigh 32,500 pounds.

THE NATIONAL STORAGE COMPANY,
Office, 217 First Nat'l Bank Bldg.
CHICAGO

HEREBY ACKNOLEDGES TO HAVE RECEIVED

Two hundred and fifty (250) Bags Timothy Seed, said to weigh 32,500 pounds. Contained in Division "B," Section Two (2), Fifth (5th) Floor, at its Warehouse premises No. 281 located at #220-#230 Johnson St., Chicago, Ill., and will surrender the same to the order hereon of ALEXANDER RODGERS, upon payment of charges, and delivery of this Warrant at its office, Chicago, duly endorsed.

It is agreed that this company is not responsible for loss or damage to property occasioned by fire, water, leakage, vermin, ratage, shrinkage, accidental or Providential causes, riot or insurrection, frost or change of weather, or from being perishable, while in storage, and that this Company shall in the custody of the above property be the agent of the holder of this warrant.

(Corporate Seal.)

Record Book C Page 295
Storage and Charges as per
Contract on file with this
Company.

Chicago March 14th, 1901.

NATIONAL STORAGE COMPANY,
C. B. BOUTON, *Pres't.*
WALTER TOD, *Treas.*

Incorporated in 1886 under the laws of the State of Illinois.

Above Warrant is stamped on its face: "Canceled Apr. 16, 1901. Surrendered by Alex. Rodgers," and endorsed by Alex. Rodgers. Likewise canceled April 16, 1901.

WITNESS: The bank now holds certificate No. 9246, delivered to it with the note of February 27, 1901, for $1,200. That is in evidence. It is one of the originals. Looking at the certifi-
106 cates 9193, 9196, 9197 and 9194, to the best of my belief these were the original certificates that were delivered as collateral security for the note of $4,500 of January 21, 1901.

The four certificates offered in evidence and marked Exhibits JJ, KK, LL, MM. All of said four exhibits are, so far as printing matter is concerned, the same as the warehouse receipts of the National Storage Company hereinbefore set forth, except JJ, 9194 being dated January 19, 1901, and calling for 481 bags of buckwheat, weight 59,814 pounds, in Div. B, 19 and 20; KK, 9197, being dated January 19, 1901, and calling for 250 bags of timothy, weight 32,226 pounds, in Division B, Sec. 24; LL, 9196, being dated January 19, 1901, and calling for 252 bags of timothy, weight 30,185 pounds, in Div. B, Sec. 29; MM, 9193, being dated January 19, 1901, and calling for 250 bags of timothy, weight 30,595 pounds, in Div. D, Sec. 5.

Re-cross Examination.

I know about the endorsement on the back of the note dated December 24, 1900.

Q. State the circumstances under which that note was made.

107 (Objected to by Mr. Peckham as not cross-examination; overruled.)

WITNESS: This endorsement was made by the bank charging the amount of $1,296.82 to the account of Alexander Rodgers and endorsing it on the note, thereby reducing his liability to the bank that much. That was done after we ascertained that he had filed his petition in bankruptcy, and the amount of $1,296.82 was the balance standing to his credit on the books of the bank at the time he filed his petition in bankruptcy, that is, the balance standing to his credit on his general account at that time.

WALTER TOD, recalled, on behalf of First National Bank testified as follows:

The signatures to the documents handed to me, purporting to be warrants of the National Storage Company numbered 8406, 8408, 8437, 8489, 8928, 9118, 9195, 9244, 9246, 9348, 9425, 9426 and 9427, being the exhibits to the testimony of Holmes Hoge
108 in this proceeding, are genuine and are regular outstanding warrants of the National Storage Company. There was an application and a valuation memorandum preceding the issuing of each of those receipts, on which they were based. Those were the ones testified to by Mr. Hoge. There was a valuation back of each one of those issues.

The applications for receipts and the valuation memoranda before me here are in evidence upon which these warehouse receipts were issued.

109 *Cross-Examination by Mr. Eschenburg.*

I have the application for warehouse receipts of May 7, 1901, introduced in evidence yesterday. The application is dated May 7, 1901, and was delivered by our custodian, E. C. Rand, to me personally. I don't remember the circumstances under which it was delivered. This was always presented to me before a warehouse receipt was issued. I do not remember what time of day it was. Am positive that it was delivered before the warrants dated May 7th were issued. E. C. Rand delivered it to me. He is our inspector, whose signature is on the side. His signature was on it on that day. I do not know what time of day of May 7th the warrants bearing that date were issued. I did not have any con-
110 versation on May 7th with Rodgers or anybody in his employ with reference to these warrants of May 7th. I do not know in whose handwriting the body of this application of May 7th is, but no one in our employ. The warrants dated May 7th were delivered to Alexander Rodgers. I have no means of recalling whether it was in the morning or afternoon. He came to our office; I recollect that. I had this application at that time. Mr. Rand brought me the application and afterwards came for the warrant. I should say there was no conversation about it. Cannot just recall. I remember his coming in and getting the warrant. That was the rule, I think, without exception, and I do not recall an instance with Mr. Rodgers; this was the same. I don't remember any con-
111 versation, if any was had. Rodgers very frequently brought in these applications, but not with the endorsement of Rand on them. Sometimes Rodgers would bring in the applications, and then we sent Rand out to have him inspect it, and made this endorsement on it. Rodgers, of course, would make the application. Now, he might telephone to our office saying that he wanted to put in so many cars of seed, and it was frequently the case that our inspector would be sent out there and would take those papers. Occasionally Rodgers would bring that paper in himself while our inspector was at the place; that is, if Rodgers wanted the warrants before our inspector got back; it would save an hour or half an hour, each way. I have no recollection what the circumstances were as to this receipt of May 7th.

112 Charter of the National Storage Company, and the amendment thereto, offered in evidence by Mr. Heckman as Exhibits TT and OO, as follows:

The original charter consists of a certificate by the secretary of the state for the State of Illinois, certifying that the National Storage Company, having complied with the act of the State of Illinois concerning corporations, is a legally organized corporation under the laws of Illinois. The object for which the company was originally incorporated is stated to be to carry on a general warehousing business, to receive for safe keeping or storage goods, wares, merchandise and personal property of all kinds, except grain; to take charge of and perform the duty of paying freights, charges, duties on, bonding, receiving, landing, hauling and delivering all such goods, wares, merchandise and personal property deposited or intended to be deposited with said corporation; to issue receipts or certificates for goods, wares, merchandise and all personal property, except grain, to the owner, or owners, thereof, when such goods, wares, merchandise or personal property have been received, are on the premises or under the control of the said corporation at the time of issuing such receipts or certificates.

The location of the principal office is in Chicago, and the original articles of incorporation are dated December 29, 1886.

The amendment to said articles of incorporation is dated October 16, 1888, and was, as well as the original articles of incorporation, duly recorded in the recorder's office of Cook County, Illinois. By the amendment the object for which the corporation is formed is stated to be "to carry on a storage and general warehousing business; to receive for safekeeping or storage, goods, wares, merchandise, grain, fruits, eggs, dairy produce, vegetables and personal property of all kinds; to take charge of and perform the duty of paying freights, charges, duties on, bonding, receiving, landing, hauling and delivering all such goods, wares, merchandise, grain, fruits, eggs, dairy produce, and vegetables and personal property deposited or intended to be deposited with said corporation; to issue receipts or certificates for goods, wares, merchandise, grain, fruits, eggs, dairy produce, vegetables and all personal property to the owner or owners thereof when such goods, wares, merchandise, grain, fruits, eggs, dairy produce, vegetables and personal property have been received, are on the premises or under the control of the said corporation at the time of the issuing of such receipts or certificates; to accept and execute trusts; to act as receiver, assignee, trustee or executor."

The notes offered in evidence by Mr. Peckham were marked Hoge's Exhibits A and F, respectively, and the warehouse receipts were marked Hoge's Exhibits G to S, respectively.

Hoge's Exhibit "A" is a note of Alexander Rodgers for $2,300, dated November 1, 1900, payable on demand to the order

of the First National Bank of Chicago, with interest at six per cent. per annum after date.

Hoge's Exhibit "F" is a note signed by Alexander Rodgers for $4,500, dated January 21, 1901, payable on demand to the order of the First National Bank of Chicago, with interest at six per cent. per annum after date.

The warehouse receipts marked Hoge's Exhibits "G" to "S," respectively, are thirteen receipts of the National Storage Company, all issued to Alexander Rodgers and by him endorsed, and are as follows, to wit:

Receipt No. 9426, Lot No. 60, 244 bags Hungarian seed.
Receipt No. 9427, Lot No. 61, 80 bags Clover seed.
Receipt No. 9425, Lot No. 59, 250 bags Hungarian seed.
Receipt No. 9348, Lot No. 58, 70 bags Alsike seed.
Receipt No. 9246, Lot No. 50, 322 bags Timothy seed.
Receipt No. 9195, Lot No. 47, 351 bags Buckwheat seed.
Receipt No. 9244, Lot No. 54, 250 bags Timothy seed.
Receipt No. 9118, Lot No. 40, 247 bags Timothy seed.
Receipt No. 8408, Lot No. 8, 250 bags Timothy seed.
Receipt No. 8489, Lot No. 25, 250 bags Timothy seed.
Receipt No. 8928, Lot No. 33, 250 bags Timothy seed.
Receipt No. 8406, Lot No. 6, 225 bags Timothy seed.
Receipt No. 8437, Lot No. 20, 250 bags Timothy seed.

JAMES C. ROGERS, a witness sworn on behalf of H. W. Rogers & Brother, examined by Mr. Kerr, testified as follows:

113 Am a member of the firm of H. W. Rogers & Brother, commission merchants in grain and seed, and members of the Board of Trade. Know Alexander Rodgers, bankrupt. He is not related to me. We made a loan to him some time this year. I asked Mr. Rodgers if he could use some money and he said he guessed he could. I told him I would like to loan him some; thereupon he said he could use $5,000, and I loaned him $5,000 on these collaterals. We had loaned Mr. Rodgers from time to time for several years, and it was understood that we were always to have collateral, just the same as if he borrowed from the bank. The signature to the note handed me is that of Alexander Rodgers. He made and delivered this to me as evidence of this loan of
114 $5,000. On February 20th I loaned him $5,000, and he gave me this note, payable on demand, with five per cent. interest.

Note offered in evidence, marked Exhibit R-6, as follows:

$5,000. CHICAGO, Feby. 20, 1901.

On demand after date I promise to pay to the order of H. W. Rogers & Bro. five thousand dollars at their office, value received, with interest at the rate of five per cent. per annum.

ALEX. RODGERS.

[REVENUE STAMP
$1.00 CANCELED.]

WITNESS: No part of the note has been paid. We hold the receipts heretofore identified as Exhibits R-1, R-2, R-3, R-4 and R-5, and which have been proved to be warrants or warehouse receipts of the National Storage Company, as collateral to that note.

(Objection to answer and motion to strike it out; overruled.)

115 WITNESS: I cannot state exactly when those various pieces of paper came into the possession of our firm. I know that all the securities were down on my desk, and I look them over and check them up and pass them to our book-keeper, Charles J. Hurlbut. Those were the receipts. We loaned the money represented by that note. Exhibit R-5, being warrant No. 9436, dated May 7, 1901, is a receipt for a car of buckwheat, and it was put in to take the place of a receipt for another car of buckwheat which he took out and shipped. They changed receipts with us. I know that personally. I do not know what time of day the exchange took place. They came to the desk there, and I stepped up and asked what they wanted, and they said they wanted to exchange those for the receipt (naming it) which they wanted to take up in place of it. I should think it was some time between eleven and three o'clock. I think it was the same day that this is dated; I think it was dated there in the receipt.

116 *Cross-Examination by Mr. Paden.*

I cannot recollect much about when that receipt got to me. I think it was the 7th. At the time the note was delivered warrants were delivered to me. I can remember that. I drew up the note and looked at the receipt with him, and checked them up, and passed them to the book-keeper. I could not say how many of those receipts which I have had in my hands this morning were among the papers without looking at them. I do not know if I could tell whether any of those identical ones were the ones or not; probably they are. It is not a fact that a good deal of the security which I took was given to me after the note was delivered to me instead of contemporaneously with the delivery of the note, only I think I made

the note, and we gave him a check, for which we had ware-
117 house receipts. I am very certain about that. I know the amount of seed that we received as collateral on the day the note was given. We have a memorandum somewhere among our papers; I think Hurlbut has it. I figured up what the value of the property was worth, and loaned the money. There were four receipts delivered to us for the note, one for a car of buckwheat, one for a car of fancy red top, and two others, for a car of timothy each. I have not the numbers of the receipts; all I have is the weights. Two of the receipts are marked here. No. 9224 was one originally —9221 or 9224,—and 9225. 9224 is here now. There was a car of buckwheat, containing 26,407 pounds. We received this receipt May 7th for 26,817 pounds in place of the other car. I do
118 not know where this buckwheat represented by the first certificate was shipped, or when it was sold by him. He came in and wanted to exchange receipts with us, and we exchanged. We supposed the seed was actually there during all this time. I never went to look at it myself until afterwards. All I know is that he brought us one of the old receipts and asked us to deliver it to him and he gave us another receipt. We have a man to sample seed, and we knew the seed was there because we had it sampled twice. I can give you a memorandum of the amount of seed in pounds in the car that we have the note for. It was 250 bags of timothy seed, weighing 31,892 pounds; 251 bags, weighing 30,081 pounds; 250 bags of fancy red top, weighing 24,969 pounds, and 221 bags of buckwheat, weighing 26,470 pounds; that is four receipts. We have five receipts now. The additional car or lot we received as security since the making of the note, calling for more margins,
119 and he had to put it up. I suppose that was done after the money was loaned; I do not know about it. We can depend upon our book-keeper Hurlbut to see that the collateral is kept good. I suppose Hurlbut received this after the collateral was received and the money loaned.

CHARLES J. HURLBUT, a witness sworn on behalf of H. W. Rogers & Brother, examination by Mr. Kerr, testified as follows:

Am book-keeper for H. W. Rogers & Brother. Have charge of the books. Know Alexander Rodgers. Know that he came in in reference to the execution and delivery to our firm of this note, Exhibit R-6. I know that Rodgers came in and received a check from me for the $5,000. The signature is Rodgers'. He did
120 business with Mr. James Rogers. Rodgers handed to me, for the firm, at that time the warehouse receipts, and I passed

them right over to Mr. Rodgers. Exhibit R-3, No. 9224, was delivered to me at the time of the making of the note. Another receipt here was also delivered at the same time that the note was delivered; that is R-4, No. 9227. There were two of those delivered to me at that time, one is for fancy red top, and the other for timothy. R-3 and R-4 were delivered to me at the time the note was made. Also No. 9225 for 251 bags of timothy seed, 30,081 pounds, and a car of buckwheat, receipt No. 9226, for 221 bags,
26,470 pounds. That was all that was delivered that day;
121 9225 was exchanged with Mr. Rodgers on May 1st. He gave
me a receipt, No. 9196, for 252 bags of timothy seed; 9196 he took out on the 6th day of May, and gave me in place receipt No. 9155. No. 9226 was delivered to Alexander Rodgers' bookkeeper, I think between eleven and twelve o'clock on the 8th day of May. He gave me receipt No. 9436 for 221 bags of buckwheat in lieu of that. That is Exhibit R-5.

Cross-Examination by Mr. Eschenburg.

This last exchange was made on May 8th, when we re-
122 ceived the new certificate and gave up the old one. I do not
know what day the petition was filed. Rodgers gave that to me in the office at my desk. I had no talk with him about it before. He wanted to exchange receipts, the same as he had done in previous cases. I did not know at that time that he had filed a petition in bankruptcy and that a receiver had been appointed. Did not hear any rumors of it. I called on Alexander Rodgers before that time for additional security or collateral, as Mr. Rodgers on the stand testified. That was about February 20th or 21st. We called
for additional security. Mr. Rodgers did not consider that the
123 amount of security was good for the loan at that time. It was
not. The loan was consummated on the 20th of February. We received two cars of timothy, one car of red top, and a car of buckwheat, four altogether, on February 20th. We have five cars now. Mr. Rogers asked Alexander Rodgers for another car as security for the loan. That is how we got the additional car. He gave him that one or two days after the 20th, after he got the money. This additional security was warehouse receipt No. 9193, for 250 bags of timothy seed. We have not that now. We re-
ceived in place of it warehouse receipt No. 9154, for 250 bags
124 of timothy seed. I believe we have that now.

Q. The delivery of that last certificate, was not that between the 8th and the 12th? A. I could not remember positively, because the certificates were generally delivered the day after they were issued. I do not know of anything that would indicate about

that. The value of the collateral that we hold is about $5,500, I think. When the collateral was put up Mr. Rogers' estimate of it was that amount originally. The price of seed had declined, in the middle of April or first of May, about $1 a hundred, but at the time that it was put up Mr. Rogers did not consider it collateral enough for the loan. He asked him at the time for more collateral,
125 and he put up this extra car. He got it within one or two days after making the loan. When Mr. Rodgers came in with this original collateral we notified him that he was to give some more, that he must bring in some more, and he came in in a day or two. After he brought in the additional there was about $6,500 worth of collateral. When we substituted one kind of seed for another I could not say whether the new kind was more valuable than the other. Rodgers said generally that it was of equal value to what he was taking out. It was the same kind of seed. When the loan was made the interest was to be paid when the note was paid. They were demand notes. We gave him $5,000 in cash. The face
126 of the note calls for five per cent. interest. I think that Rodgers got the money in the forenoon, and that he was asked for the additional security in the afternoon, about two or three hours of that time after he had his money. I should think there should be some margin in the collateral now. H. W. Rogers said nothing to me about doubting the financial standing of Alexander Rodgers. We had had a good deal of business before that. We always
127 wanted to have a good full collateral security for any money we loaned him. I do not think it was particularly because we were a little bit afraid of his financial standing any more than with others that we loaned money to in that way. They wanted full collateral for all loans of money. Did not loan a great deal to people on small margins whom we knew to be perfectly good. There are no men on the board that we loan money to without calling for collateral or margins.

Re-direct Examination.

The quantities of seed received in exchange for seed surrendered would come within 100 pounds of each car, I should say. In reference to the buckwheat that was exchanged there were a few pounds more in the car that he brought back than there was in
128 the car that he took out. The difference was about 150 pounds of seed, amounting to $1.50 or $2.

GEORGE R. BARD, recalled, examined by Mr. Heckman, testified as follows:

All of the papers I found in the safe I took over to the of-
129 fice that same day, I think. Think it was Friday, would not be positive. I do not believe I took any of the papers over before Friday, but on Friday took over most all. Carried all the books and papers and things over. At the time I went to the office would take a load with me. Could not say positively when I got those papers out of the safe,—on the date that I would go over there. The note written by Mr. Wilson to me while I was there is not in my possession. The signature to the paper shown me is that of Mr. Wilson, the receiver. I received it from him on the same date. Could not say positively, but I think it was Friday, that would be the 10th. Do not think it was on the 9th, the day it was dated. Would not be positive about that. Rand brought it to me.

130 The paper testified to offered in evidence.

(Objected to; objection sustained.)

The paper was marked for identification Exhibit C. H. B. and is as follows:

CHICAGO, May 9, 1901.

George R. Bard, Custodian,
Chicago, Illinois.

DEAR SIR: Kindly allow a representative of the National Storage Company admission to premises of Alexander Rodgers, 220-230 Johnson street, Chicago, Illinois, as they have a great deal of property in storage in that building, and their man is desirous of watching and looking after it.

Act in unison with him. Your interests are entirely separate. The National Storage Company's property is distinct from that of Mr. Rodgers'. Their representative will undoubtedly explain all to you.

Yours truly,
CHICAGO TITLE & TRUST COMPANY,
By WM. W. WILSON.

Q. Was the man admitted in compliance with that notice?

(Objected to; objection sustained.)

MAY 24, 1901.

GEORGE R. BARD, recalled for further examination, examined by Mr. Wyeth, testified as follows:

131 I went down to Rodgers' place of business on Wednesday,
132 the 8th, at the instance and direction of Mr. Wilson, representing the Chicago Title & Trust Company. As near as I can remember it was about twelve o'clock. I entered the building from Johnson street, the entrance that leads up to the building. The first floor is about five or six feet above the sidewalk, there is a stairway right up to that first entrance and up that stairway. That is the front entrance of the building, on Johnson street. It was open. When I entered I went into that door, across a space, I should judge, about twenty feet. There is a partition there. Do not believe there was any door attached to the opening there in the partition. I turned to the right to the rear of the building, that is, to the south wall of the building, and there is a stairway running up to the second floor. Went up that stairway. The building faces west and Johnson street runs north and south. I went up a stairway, and when I arrived on the second floor I turned to the left and went into the office, which is in front of the building. That
133 is, it is occupied as an office. It is partitioned off that part of the floor by board partition, there on the second floor. That was Rodgers' office. I found Mr. Vaas there, Rodgers' bookkeeper. I asked him for his name; he stated what it was, and I told him I was sent there by the Chicago Title & Trust Company to take possession of the property, by order of the United States Court, and I then presented him with a copy of the order to read, and he did so. Cannot recall positively whether there were any other persons there at the time or not, do not believe there were right at that time. I told Vaas I would like to go over the building and take possession of the property, and he said, "Very well," and we started out and went down-stairs to where I entered, down the first flight of stairs, and then down the stairway to the basement,
134 and he said, "We occupy this."

(Motion by Mr. Heckman to strike out what was said by Vaas as not binding on the National Storage Company; motion denied.)

Q. What did you do in the basement?

135 Mr. HECKMAN: I move to strike out the conversation had with Mr. Vaas.

FOR THE RECEIVER: We do not offer the conversation to bind anybody: they went into the conversation on the direct.

(Motion denied.)

136 A. We went down into the basement and I think we walked down to the elevator and walked through two aisles there. If I remember right, went down and back, and went upstairs back to the office there on the second floor.

WITNESS (continuing): Did not do anything on the first floor, only walked through there going down to the basement.

There is nothing on the first floor. In the basement saw piles,
137 tiers, bags piled up in tiers about seven or eight feet high. In the second floor there was the same condition. The first one there, there was material piled there in the way of bags of grain and things of that character. The sacks are piled on the south side of the center of the building and extend back from near to the elevator, which is in the rear of the building, about the center of the floor. The floors, I should judge, are about fifty or sixty feet wide by 100 or 125 feet in length. I mean the elevator was about the middle of the back of the floor. It was along the rear wall; that is in the center of the floor, north and south. It is a freight ele-
138 vator. When we went back to the second floor we walked on that floor from the office, that is, when I landed on the second floor I was right near the office door. We walked down the center of the building and walked back to the elevator, then called the man that was running the elevator and went on to the third floor. On that floor just walked through and looked around and went on right up, just the same way, covered all the floors. I would not be positive how many floors there are beside the basement; I think six, possibly seven. After we got through went down the elevator back to the office. There were men around there on the different floors. I would not know who they were. They were working there, the employes, as I was given to understand. They were stacking up,—

Mr. HECKMAN: I ask that that be stricken out, what he said about their being employes.

139 The MASTER: What did they appear to be doing there?

A. They were sacking up the stock; that is, some of them were filling the sacks, and others were sifting them, taking the dirt out of them; they had screens there.

WITNESSS (continuing): A net screen, just cleaning there. None of them were in or about the office. Cannot positively say what floors they were on, but I think the fifth floor. There were three working there besides the man who was running the elevator; that is, there were four, including him, when he came down to the second floor with the elevator to take us up. Mr. Vaas and Mr.

Black accompanied me on all the floors. He went twenty-five or thirty feet from the elevator on each floor. He did not go around with us. I think it was Thomas Black. I saw him doing work about there, but not at that time, when I made my first trip.
140 I do not think they were doing any work on any of those bags that were piled up and tagged with the name National Storage Company that I remember. Vaas gave me the keys after we had been over the building; I should judge possibly half an hour after. He gave me the keys in the office. There were four or five, I think one was for the outside door. Later on Mr. Black came into
141 the office, and I got a key or two from him. I think there were two sets of keys. I had two sets of keys, two for the outside door and two for the door leading up to the second floor in the office. There are other doors or entrances to the building besides those I have mentioned. I should judge they were not public entrances. They are between the General Electric Company. There are boxes on these stairs going to and from one floor to the other; that is, for the watchman to pull that goes through the building for the General Electric Company. These are on the north side of the building. The building is divided through there. There is a door through on each floor. It is, I believe, a wooden partition; there is a door in the partition, as I remember now, and that
142 door is locked on the Electric Company's side by a padlock, I think. I saw the staples that came through for a hasp, and I would judge it was for a padlock. Did not see any signs of any other lock. There is an outside door on the first floor that leads out to the loading platform, the switch track. That door is about twenty feet back of the front of the building. There is a loading platform there by that door about six feet wide. I did not go out by that door, it is barred on the inside. There was a safe there in the office, and office fittings and furniture. I did not find any one on the premises that claimed to be there on behalf of the Na-
143 tional Storage Company. I noticed some of these small tin signs which have been testified to. I don't know exactly the floor that they were on, but where those bins are, I think it is the fifth floor, the fourth or fifth, either one or two of these tags are tacked on those bins. Do not know whether it was on that same floor or not, think it was in the rear of this, along the rear there were some, did not notice them the first time I went in there. Those on the bins were not very clear to be seen. The bins are the part of the machine that cleans the seed. There was one there; that was not bad, but the rest of them were pretty well covered with
144 dust. They were about six feet high. There were no letters on the second floor of the building when I went in there, indicating division or section, that I can recollect. I locked up the

building that night and retained the keys. I think that same afternoon, about four or five o'clock, I saw some one claiming to represent the National Storage Company; that was three or four hours after I first went in there. Am positive it was that same afternoon. Did not see Alexander Rodgers after going there until I met him day before yesterday in court. I kept the different employes, or people, that I found working there, at work. There was some seed that needed sacking, and I kept those employes sacking the seed, and the book-keeper, I told him to go on and complete the books, that is, close them up. I kept him that day and a couple of
145 days after. I think one or two days. I do not remember positively whether I saw any other piles of sacks in the basement on which there were no tags at all. There were other sacks there and they were tagged with tags similar to the National Storage Company's. They were not the National Storage Company's tags. I could not remember, I cannot say positively how many piles I saw in the basement upon which there was the National Storage Company's tags upon one of the sacks. I should judge four or five. Could not state positively how many piles there were in the basement having tags other than the National Storage Company's;
146 there were one or two, anyway. There was nothing else in the basement that I know of. On the second floor I found the same condition as in the basement, but those had the National Storage Company's card on. There were not any piles of sacks on the second floor that had other storage tags on them than those of the National Storage Company. There were no piles that were not tagged at all on the second floor, but there were a lot of bags stood up lining against the wall. I should say twelve or fourteen in line, that stood up on end not piled. I should judge there were about one hundred bags there on the second floor aside from those that were in piles upon which there was a tag, that is, bags that were sewed up there, part of them were sewed up and the balance of them were not, that is, the mouths of the bags were sewed. I
147 cannot remember what condition I found the north half of the third floor in—about a similar condition. I could not say about the north half of the third floor. The fourth floor, I think, was similar to the second; I would not be positive about that. I mean by that that there was one side where the men were working cleaning the seed on the fourth or fifth floor, I would not be sure. They were cleaning the seed on the south part. Could not recollect now what, if anything, was stored on the north part of the fourth floor. I took the inventory, that is, Mr. Vaas took it, and then I checked it over afterwards. I took it after he copied it and went around and checked it over. By seeing that inventory I could tell —recall it to my mind, otherwise I could not tell positively; could

not say where the men were getting this seed from that they were cleaning on the second floor, where I saw them cleaning. They were piling the seed up in front on the south side of the building, that would be the south-west corner of the building, after they
148 were cleaned. Did not pay much attention to the goods stored on the fifth floor; could not state positively as to that. Think the top, or sixth floor, was in a similar condition to the second, except that I do not believe there were anything else there by Storage Company—would not be positive whether that was the fifth or sixth floor—beside machinery. The machinery runs up to this floor. There is no machinery on the top floor. In the sixth floor I do not believe there is any stored there at all, would not be positive. Saw some goods on the fifth or sixth floor with a card on marked "Wymans." Those goods did not at that time have any tags of the National Storage Company on. I found goods on the fifth and sixth floors, or one of them, without the National Storage Company's tag on. Found a great deal of goods on those floors
149 that had no tags of the National Storage Company on them. I found the men working there, going in and out, while I was taking charge; they were all over the building. There was no division or partition or anything between those floors to keep them from going all over the building any time they chose. I cannot be positive without a memorandum whether there was not in the south half of the fourth floor some bags on which were tags of the National Storage Company. Think I have the inventory. Mr. Davis had one in his book.

Q. I would like to have it produced.

(Thereupon the witness produced the book referred to, and after referring thereto testified): I do not recall anything stored on the fourth floor. There was nothing stored on the south
150 half of the third floor that I can remember bearing the National Storage Company name. I went there on Wednesday, the 8th, and the inventory was completed on the following Friday, the 10th.

Examination by Mr. McNab.

I do not know how you would call the third floor divided into sections. There is nothing to designate it except post signs; unless a person understood he would not know anything about it. The post signs go over the entire fourth floor each way, the posts
151 run through the center. Each post is not labeled with the section and division number. The space between the posts is numbered with the section number; those posts that run across it, that hold the next floor, those signs are on each of them, a division or

section number. Could not say positively what floor, I think it was on the fourth floor, that the seed was pretty well divided throughout the floor. The fifth was pretty well filled up, if I remember correctly. There was not so much on the sixth, if I remember right. There was not a great deal of seed on the third
154 floor that I remember. I remember right in front of the elevator on the sixth floor there were eleven or twelve sacks standing. They had none of the tags of the Storage Company on. I remember I pointed out *222* bags of timothy on the third floor. I counted them over, but would not be positive about the tags. Rand brought that letter to me from Wilson. I know that a
155 party claiming to represent the Storage Company came out there some time. He had a package of cards. He said they were cards, I did not see them, but saw the envelope they were wrapped in. I think when he first came in he spoke to Vaas, and Vaas referred him to me, and he wanted to put those cards on the property in storage. I told him he could not put any cards on anything there unless he got an order from the receiver. He put up tags afterwards, after getting an order, on the piles there on different floors. The tags that were put up there afterwards were
156 about 4x8 inches. The National Storage Company tag now shown me is similar to the ones put up, the printing, I should judge, is about the same. The one I hold in my hand is hardly a tag, it is more of a label, and about ten inches by three or four inches. It was similar to one of them. What is on the tag reads as follows: "Warehouse premises No. . . . , leased and occupied by the National Storage Company, Public Warehousemen, Chicago." I would not be positive the printed matter is exactly the same as this or not, but think it is. It had the name of the National Storage Company on. I did not see this kind of a tag on any of the property or on the walls of the warehouse at any time on the day
157 I first went down there. As to the number of tags they put on each floor similar to that, would say that in each section, or what is supposed to be a section there, as I understand it, they had two tiers of bags piled up, two piles, that is, rows piled seven or eight feet high. They took this tag and put it on one or two of them; put a hook in there and the hook went in here (indicating) like this (indicating) and attached to both tiers of bags. I watched them all the time they were putting those tags on. Went up
158 through the floors as they put on each one. They did not put on any other kind of tags except those; am sure of that. They put those tags on bags that were not previously covered with a tag or label. That is, in this way: Say here is a tier of bags running out from the wall, and a small card was on there; over here (indicating) was another tier right opposite, and there was no card

on that at all; they took this card and attached it to both those tiers or rows; they attached a hook in this side, and also attached it to this side; that would cover the two tiers; but the other card, the small card, was only on one tier. The tiers of bags were not separated by a space; they were just piled end to end. Well, there was a small space between them, probably four or five inches. Those tiers made up a row of bags, and then there was another which ran end to end, so that each bag had a companion at its end. I could not say that those tiers were all under or in the space that was designated by section number. The section was marked
159 up so I could not see where the dividing line was. As to whether there was a post between each section, in one particular case there were two tiers, that way (indicating), two rows, and the post divided both of those rows. There was a post standing in here (indicating). They were piled close together until they got out to that column that was standing there, from the floor up, and then in front of that post was piled four or five bags high right in front of it; that is, right across in here (indicating), and that would bind them two together, lapping over on to another section, if you would call that a section where the post would be, a division. They would be each side of the post. Say this is a section here (indicating), there would be a pile on each side of that post and out in front, say four or five sacks piled right in front of the post. As I understand it, the post would be a dividing point between the sections. There was a label on the bags only on one side of the post; I think it was on the four or five bags piled in front of the post.
The four or five bags were outside of the section. They were
160 out in the passageway to the front of the section. It looked to me as though they had bound those two sacks together with those two tiers of bags. There was one on each side of the post. Would be standing here (indicating); one row on one side of the post and one on the other. When I went there the tag, I think, was on the bags that were in front of the post. I mean there was nothing to indicate that the other row on the other side of the post were claimed by the Storage Company. There was nothing to indicate that either of those rows were claimed, only so far as the binding of those two bags together across there. That was when I first went there. I said there were eleven bags of seed on the sixth
161 floor, in front of the elevator on which there was no National Storage Company tags. I am positive that the company never
162 put any tags on there as long as I was there. The company attached labels all over the place, wherever there were two rows together they attached this card between them in that manner (indicating). There was no other instance where two rows were separated one from the other by posts that I remember. None

of the small-sized tags showing the number of sacks in each pile and having the National Storage Company's name upon them, with the direction that the tag must not be obscured or removed, and which were originally on there, have been removed from the premises until the other day, when they were asked for by the court to be brought down here. Before that, when Mr. Rand put those cards on, he probably found a place where he could not bind them together, he would take those off again, what he could, and take the card and go and put it on another row. He did not remove the tag from the pile in any instance. I don't know whether I could point out the
places where he removed any of those tags. I didn't pay much
164 attention to it, just followed out the instructions I got to let
them be put on. I should judge he removed half a dozen or more tags. They were moved, it appears to me, in the same section. It would be on a new pile. Suppose some of those cards called for three piles, as they did, if I remember correctly, he probably put those on the two piles, that is, joined the piles together, and took this tag off and put it on the third pile. I could not say positively. I have not been there all the time until the present. Think I left there the 14th. When I left there were some men there representing the National Storage Company. They came there on
the 10th or 11th, about six o'clock in the evening. The first
165 time the National Storage Company man came there he did
not put up any tags because I would not let him until he got an order. I think it was Wednesday about four o'clock that he came, and I think he put up the cards on Friday morning. He did not stay any time. There was a man employed, as I understand,
connected with Mooney & Boland. They were sent down
166 about six o'clock on Friday evening, I think; that would be the
10th. I staid there for Rand, and they came in, brought some tags down, and Rand and I left those men there. I locked the door; a watchman staid there; left them locked up inside and under the charge of the watchman; he was in my employ while I was absent.

May 24, 1901.

WILLIAM H. SMALL, called on behalf of the National Storage Company, examined by Mr. Heckman, testified as follows:

I reside in Evansville, Indiana. Am a grain and seed merchant. I hold certificates Nos. 9067 and 9086 of the National Storage Company. These are the certificates (producing same).

Q. Do you hold these as a loan or for goods purchased?

(Objected to as calling for a conclusion, and as incompetent, irrelevant and immaterial; overruled.)

A. For goods purchased outright.

WITNESS (continuing): The signature on the back of each
168 of those certificates is the endorsement of Alexander Rodgers and W. H. Small & Co., of which I am a member. The signatures attached to these certificatse are those of C. B. Bouton and Walter Tod, the president and treasurer of the National Storage Company, and that is the seal of the company.

(The certificates introduced in evidence are in the same form as those of the National Storage Company hereinbefore set forth. Certificate No. 9067 is for 250 bags of timothy seed, said to weigh 32,839 pounds, contained in Division E, Section 8, second floor of the warehouse premises. It is issued to Alexander Rodgers and endorsed by him, and dated December 14, 1900. Certificate No. 9080 is for 250 bags of timothy seed, said to weigh 32,127 pounds, contained in Division E, Section 5, second floor of the premises, issued to the order of Alexander Rodgers, and by him en-
169 dorsed, and dated December 18, 1900.)

Q. Have you been to the premises to examine if the property is there which is described by those warrants, and in the section and division mentioned in those warrants?

(Objected to as immaterial, irrelevant and incompetent; overruled.)

A. Yes, sir; I have.

WITNESS (continuing): I was there this day a week ago, and also yesterday morning; that is, the 17th of May and the 23d of May. I was able to locate the sections and divisions by the wording of the warrants, and I found 250 bags of timothy located as described by both of the warrants. I found them both in Division E, Section 8, second floor, I found 250 bags of timothy; and in Division E, Section 5, second floor, I found 250 bags of timothy, as described in the warrants. Found the 250 bags stacked up in two rows, that is, 125 bags in each row, the two piles joined
170 together end to end, commencing back at the side of the hall, and stacked up seven or eight feet high, and then lying on the floor until we got the required number. It was a separate and distinct pile. The same thing would apply to the second warrant. There were different cards on the rick of stacks. There was the National Storage Company card on it and also our own name. There was a card attached to the pile described in certificate No. 9067 when I was there on May 17th, and the same conditions existed on the 23d. I saw the National Storage Company's name on it, and it specified 250 bags of seed.

(Objection to the witness stating the contents of any card; sustained.)

171 WITNESS (continuing): Looking at the cards now shown me, to the best of my recollection they look like the same cards that were attached to those two piles that I have mentioned. They either are the same cards or cards that look the same.

The card read in evidence, as follows:

"National Storage Company, Warehouse No. 281. This card must not be disturbed or obscured. Dated December 17, 1900. Lot 39, Div. No. E, Sec. No. 5, number in pile 250 bags timothy seed. Owner, W. H. Small & Co., Louisville, Ky."

The other reads identically the same as the foregoing, except that the date is December 14th, Lot No. 36, Section No. 8. It also states that the owner is W. H. Small & Co., Louisville, Ky.

WITNESS (continuing): Myself and Morris L. Johnson compose the firm of W. H. Small & Co.; Johnson is my partner.

Q. Where was that card that I first read placed with reference to the timothy seed mentioned in it?

172 (Objected to as immaterial, irrelevant and incompetent; overruled.)

A. It was attached to the bag about five feet from the floor, probably the fifth or sixth bag from the bottom of the rick, towards the top; it was not on exactly the top one, but one or two from the top. About where you would walk up to the end of the rick; it would be up to about your breast, possibly nearly as high as your shoulder. That was on the second floor.

Q. Were those bags so placed that they constituted a distinct and separate pile, or otherwise?

(Objected to; sustained.)

WITNESS (continuing): These bags seemed to be piled separate and distinct from any other pile. It was easy to locate the pile of seed that belonged to that particular warrant. I don't remember that there were any other piles of bags there than this number described in my warrant that were touching any pile or contiguous to it. There would be a passageway, a short space, separating
173 it from any other seed. This stuff of mine was between four posts; the posts were far apart, though. The 250 bags were stacked up in two ricks in Division E, Section 8, and in straight, contiguous rows, two rows exactly the same length and the same height, 125 bags constituting each rick, and the two joined up close together, and in as close and compact a pile as you could pile them, and then no other touching it; that is how I found it. This card that was attached to it was attached to the fourth or fifth sack from the bottom, at the front end of the rick, when I first came to it; when I walked up to the pile the card was facing me. The building is so easily marked off with signs that you can

easily tell the division number. You can see Division E, Section 2, or 3 or 5, just as it reads in that warrant; it was not very hard to locate the space in the building described by the warrant. I
174 have with me the checks that I gave for these goods. Have paid for them. Bought them of Alexander Rodgers; paid him a market price; there was a big lot of them; there were five or six thousand bags, all bought there in December, and were being shipped out from time to time, when this collapse came. I didn't lend him any money and take this as security; it was an absolute purchase and I paid for it all. With reference to storage, and my paying him storage for it, I think there was something said about my paying storage after a certain length of time. The warehouse receipt calls for storage. I paid the storage to the National Storage Company. That was all the storage that was provided for, whatever the warrants called for. That was not due to
175 Rodgers; it was due to the National Storage Company, under the terms of the warrants. The address, "Louisville, Ky.," on the bottom of the cards is a mistake of somebody. They put the address on the "Louisville" instead of "Evansville," a clerical error; it should have been Evansville, Ind., instead of Louisville, Ky., but the name is correct.

Cross-Examination by Mr. Paden.

My recollection is that that building down there is about 60 feet wide and 80 or 90 feet long. There are two sets of posts running middlewise of the building, making about a 20-foot stand from one post across to the other. That makes the supports of the floor above, and these girders that run lengthwise apparently divide the building off into three sections. They call the south third one section, and the middle beam another section, and the north third of the building another section, these wall plates or girders
176 making a general division of the building; and I noticed that those plates that come down about a foot, that the joists run on, make a convenient place to put up a sign of the division it was and what section. I saw those letters on that girder. I could tell whether Division E, Section 8, was north or south of the girder, the same way I know the letter A is A by looking at it, or B
177 is B. The letter would not tell you what floor it was. The same terms might apply to all the divisions on different floors. When you start in at the bottom you know that you are on the first floor; then you go to the second. These symbols merely indicate the divisions on the floor. There were three divisions on the floor, A, B and C. Then those were subdivided into sections, 1, 2, 3, 4, or 5, 6, 7, as it might be. You were standing in the middle

division and looking north. You know that the section commences at the wall. Here is this wall; you are standing facing the section; you look up to see that the sign is E; you know that it runs from you back to the wall. It is the same way that you go into a sleeping car, and you see your berth with the number above; you know that what is behind those letters is berth 9, say; you are looking at Section E, and Section E extends from your eye east from you. There was a man that said he was there as care-taker for the National Storage Company, who went with me that day. I helped to locate the space myself. When I saw these tags I saw these words written in pencil were on there: "Owner, W. H.
179 Small & Co., Louisville, Ky." I do not know who put the words there. The same words were on the other card when I first saw it.

(The card marked Div. E, Sec. 5, was marked "Small Exhibit A." The card marked Div. E, Sec. 8, was marked "Small Exhibit B.")

WITNESS (continuing): I don't suppose I have any means of knowing whether the goods that I saw there when I first went in there, on December 17th and December 23d, were the identical goods mentioned in those certificates.

I never saw that property in these two divisions that I have spoken of before the 17th of May, and as far as I know, no one was ever there to see it but me, personally. When this purchase was made of Rodgers, part of it we had shipped, my recollection is, right away; part we asked him to put in storage, and took receipts for each car separately; these 250 bags making a car, and
181 drawing on us with the warrants attached to his draft, and then as we wanted the seed shipped out to different parts of the United States, we would order it shipped out. We bought this seed that I have spoken of and other seed that time in December, and in the course of time received through the bank at Evansville these warrants with the draft attached, which I paid, and also an invoice from Mr. Rodgers. As far as the purchase was concerned our transaction was wholly with Alexander Rodgers and not with any storage company. We have made sales from time to time since last December of this seed. When we made sales we turned in the warrants that we had. They were sent back to Chicago here, with orders to ship the seed to different parts of the country. The directions to ship it were sent to Rodgers, and I sent the warrants to Rodgers. Rodgers was our correspond-
182 ent in business; he acted as our agent for the forwarding of the property. I am not able to recollect whether there was a charge made each time for storage or not in sending in these warrants; it was probably, naturally, in a lump sum. We might send

up on Wednesday for a car to be shipped out, and on Saturday follow it with instructions for another car to go out. If we paid any storage since December 14th we paid it through Rodgers. We paid for the seed represented by these storage certificates, and the warrants were sent to us December 14th and 18th, and we have held them ever since. Have paid for seed from Rodgers since December 14th. Think that other seed was secured under these same warrants. That would not be shipped out and other seed
183 substituted for it. The seed that we bought of him afterward was shipped right away. I know there was a big purchase made on the 2d of January, to be delivered to us during that month, and we sent him the shipping instructions, and that was shipped out and paid for, and probably did not have to go away to storage. That had nothing to do with these warrants. I do not know whether Rodgers and the Storage Company did not take the identical seed that I claimed to have bought in December and ship it out on one of our subsequent orders. Never saw the property that I bought in December, under these warrants, until May 17th, a week ago to-day. Have had different warrants for all other purchases that went into storage made since December 17th.

E. C. RAND, sworn on behalf of the National Storage Company, examined by Mr. Heckman, testified as follows:

Have been custodian and inspector for the National Storage Company for three years. My duties as such are to inspect lots in storage and inspect lots released, releasing them from the storage after the receipt is cancelled. Was connected with the National Storage Company in August last. I made the inspection upon the application offered in evidence yesterday as "Exhibit C," on August 31, 1900. Upon receiving this application I went to 220 to 230
185 Johnson street, counted the bags of timothy seed in Lots 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, and placed a card on each lot, the card calling for the lot number, the section number, the division number and the floor, and the number of bags contained in the pile, and the timothy seed—I mean the number of bags of timothy seed. Then I endorsed this as custodian, and the warehouse receipt was made out and delivered to Alexander Rodgers. I helped make out the receipts. They were made out on the typewriter. I copied them and delivered them to Rodgers. The warrants were delivered the same day that the applications were delivered, August 31, 1900, and after the inspection was made by me.
No part of the warrants were issued before I made the inspec-
186 tion of the whole of the goods mentioned in the application.

Here are two of the cards which I attached to the piles of goods at that time. One of them is on Lot 6. It was placed on a pile for which warrant No. 8406 was issued; placed on one of the bags. I suppose I could see that in front of the pile, about four and a half feet high from the floor. I should say it was pretty close to the center of the pile. It depends on the way the bags are piled; that makes a little difference. This was 225 bags, and I suppose was piled a little different from 250 bags; but we en-
187 deavored to put these in the center of the pile, or as near the center as possible. If there are two rows, of course, half way up them, exactly in the center; that would be in the very small crack in between. We put them very near the center, as near as possible in the center of the pile. That crack in the center of the pile would be as much as four inches. It would not be the width of that card. The bags are piled in two tiers going from the wall out, end to end, flat on the sides. This is the way they actually existed, and is not a sample case. In all cases it would depend on the height. The car load lot is 250 bags. In that case they are piled that way if they are a little bit loose, two or three or four bags; they are piled across; in that case the tag is put on those piles. This is the identical card that was placed on those bags. The card reads as follows: "No disturbance permitted while this card is posted. Warehouse card National Storage Company, dated
188 August 31, 1900, Lot No. 6, Sec. No. 6, 225 bags of timothy seed." The words, "First National Bank," written under there on the card were not there when the card was first issued; do not know who put those words on. The other card was placed on Lot 8, on the goods described in Warrant 8408. That pile was arranged in two rows the same as the other, and the card was placed upon it in the same position, four and a half feet from the floor. The card is identical with the other except that it is for Lot 8, Section 8, 250 bags timothy seed. The other cards have been destroyed in the course of business. When the warrants are surrendered the cards are cancelled. It is not customary to preserve them. The other cards were in form the same as the cards
189 which I have head.

(The foregoing two cards introduced in evidence, and marked "Rand Exhibits 1 and 2," respectively. The card for Lot 6 being marked "Rand Exhibit 1," and the card for Lot 8 "Rand Exhibit 2. Exhibit 1 is for 225 bags timothy seed in Division D, Sec. 6, and Exhibit 2 is for 250 bags timothy seed, in Division D, Sec. 8.)

WITNESS (continuing): They were the same date and the printed matter was the same. The lot number was different and the section number different. The number of bags were, I think,

all the same—250 bags of timothy seed—with the exception of that one of 225. The one for which Storage Warrant 8401 was issued was lot No. 1, section No. 1, Division B, fifth floor. The one for which storage warrant No. 8402 was issued was Lot 2, Section 2, Division B, fifth floor; 8403 was Lot 3, Section 3, Division B, fifth floor; 8404 was Lot 4, Section 4, Division D, third floor; 8405 was Lot 5, Section 5, Division D, third floor; 8406 was Lot 6, Section 6, Division D, third floor; 8407 was Lot 7, Section 7, Division D, third floor; 8408 was Lot 8, Section 8, Division D, third floor; 8409 was Lot 9, Section 9, Division D, third floor; 8410 was
190 Lot 10, Section 10, Division D, third floor; 8406 was for 225 bags of timothy seed, and that was put on the card. It was on the third floor, lot No. 6. I inspected that August 31, 1900. That is Exhibit C. I made inspection of the goods mentioned in all the applications marked Exhibits F, G, H, I, J, K, L, M, N, O, P, Q, R and S. I mean by inspection that I counted the bags
191 and placed the tags on them, the same way in which I have described what I did with reference to the property named in Exhibit C. In reference to the contents of the bags, I won't say that it is the rule, but very often, I should say half the time, they were tested. I have tested it as to the quality of the seed. I know what kind it is, but I do not know the quality of it. I know timothy seed from clover, and timothy from red top. I do not say that I can explain it. I have at times opened a bag, about half the time. Would run it through the tester.' That is an instrument we have for testing the seed. This inspection of the seed was always made prior to the time the warrant was issued. The number on the seed warrant stating warrant number indicates the number that was issued on this application, and each of these inspections was made prior to the issuance of the warrant corresponding with the
192 lot of seed. The inspection included, beside the counting of the bags, the inspection as to the location, the section number and the floor. The floors are divided; the sixth floor is A; the fifth, B; the fourth, C; the third, D; the second, E, and the basement F. The floors are divided into sections, 1, 2, 3, 4, etc. The fifth floor has, I think, thirty or thirty-one sections; the other floors below have less; the basement has twenty. The letter E would only occur on one floor, the second; that is designated as Division E. The basement is referred to by Division F. In the case of letter E, that is indicated on signs. I don't want to swear that they are on the second floor; they should be; they may have been taken down. The divisions were indicated up above the piles,
193 above where the piles are at the present time. Division letter E is situated up above each section. The letter F refers to the basement. That is marked above each section. The letter B is on

the fifth floor, and does not occur on any other floor. Division
194 D occurs on the third floor only. I have made a plat of those floors. These are they. They correspond with the floors. I would not say as to the exact measurements, but very close; they correspond as to general location of the sections and positions and divisions. These are all of the floors that are occupied by any part of the property of the National Storage Company. There are some of the floors in which there is no property of the company covered by the lease, the sixth and fourth floors. No part of those floors is occupied by the National Storage Company's property. There are no letters like these blue letters marked on the floor.

(The plats testified to offered in evidence; objection, and
195 plats excluded.)

196 WITNESS (continuing): I have the original cards that I put up on those piles of seed when I inspected them. (Witness produces same.)

(The cards are introduced in evidence, and on suggestion of the referee it was stipulated in the record that one tag shall stand for all in connection with the testimony, and that it shall not be necessary to put in evidence all of said tags.) One of said tags is as follows:

7. NATIONAL STORAGE CO.
WAREHOUSE NO. 281.
THIS CARD MUST NOT BE DISTURBED OR OBSCURED.
Date, May 7, 1901.
Lot No. 63. Pile No...
Div. E. Sec. No. 6. Fl. 2.
No. in Pile, 250 Bags Timothy.
Whole No. in Lot, 250 Bags.

197 WITNESS (continuing): These cards correspond identically in printing and form to the cards introduced as Small & Company's Exhibit A and Small & Company's Exhibit B, with the exception of the first batch. Very shortly after that first batch we got the new style of cards and put them on. I have brought down, as requested, in compliance with the suggestion of the court, two of the original board signs from the warehouse showing the division number. (Witness produces same, which were about a foot square.) The board which you hold in your hand is one of the boards indicating division number and section number in that warehouse. It is about a foot square. As to the size of the letters printed upon it, should say that "Div." "B," "Sec." "3," are two by three inches, and the capital letters "D" and "B" are two
198 by three inches, and the small letters one inch, or an inch and a quarter. These are simply boards that are put over the sec-

tions stating the division and section, and in my inspection in each instance I saw to it that the pile corresponded in its location and was placed relatively under the cards such as these.

(Motion to strike out; denied.)

WITNESS (continuing): As to the entrances to the main floor of the warehouse, there is one entrance from the street on the west side; that would be No. 230; then there is an entrance from the loading platform at the railroad track to the south, and also an entrance through the General Electric Company, to the north on the main floor. There is one entrance from the main floor down to the basement stairway, and one from the basement of the General Electric Company into the basement of Alexander Rodgers. We have a lock on the basement door from the first floor into the basement. The entrance from the main floor to the other floors is a stairway from the first floor to the second, and also the elevator shaft to all the floors. I averaged five or six times a week in my visits to the warehouse from the date of my first inspection, August 31, 1900, till the day of the filing of the petition in bankruptcy. On those visits I was accustomed to inspect car lots going in, or inspect the releasing of goods going out from the warehouse. As to the manner of releasing goods going out from the warehouse, a warrant was presented to our office by Rodgers, or generally by Vaas, if not Rodgers, and cancelled; then we issued a release, which I took to the warehouse, took the card off the goods and had the release signed, and delivered the goods in that way. I also took a removal permit issued by the storage company. Did not always deliver it to the one who brought the receipt cancelled; delivered it at the office. The receipt was not delivered until I had gone down and inspected the stuff out and took the card off and delivered the goods to some of their men in that way, taking the card off and delivering it, and in each instance I took the removal permit which is in evidence, took the release and the removal permit. The paper shown me is the removal permit, and is in the form of the permit that is issued. The paper handed me is the form of release which I have mentioned. The first paper, the "release," is signed by the president and treasurer or secretary of the National Storage Company. The removal permit is about a copy of it in substance. The blank space in the permit is filled in with the substance, the same as the warrant and the same as the release, and signed by some officer of the company, generally Mr. Tod, treasurer, and signed by the secretary and president. The release and removal permit go to the warehouse. I remove the card from the lot called for in the release and present the release and removal permit, together with the card, at

the office, having it signed by Alexander Rodgers. Rodgers then puts on file the removal permit and returns the release to us, which I endorse, as custodian, for the delivery of the goods. The release always has the seal of the company attached to it in each instance.

203 (Forms of removal permit and release referred to, introduced in evidence, and marked "Rand Exhibits 3 and 4.")

Said papers are as follows:

oval

REMOVAL PERMIT

THE NATIONAL
STORAGE COMPANY,

This Removal Permit is for the ..... For Removal
.....
property covered by Release .....
.....
No..... of even date. .....

Hereby Acknowledges to have Received •
Cancelled
of .....and endorsed its Storage Warrants No....., and has issued its release of even date and Warrant Nos to the Custodian of its Warehouse Premises No...., located at ....., who is by said Release authorized and directed to permit the removal of the property thereby released and specified in the duplicate receipt hereon; upon presentation of this REMOVAL PERMIT, with the receipt duly signed by.....

NATIONAL STORAGE COMPANY.

..... By .....
..... received this day of the
NATIONAL STORAGE COMPANY.

.....
.....
all
being a portion of the property covered by its Warrant No....., issued to the order of .....
.....

.....

The party entitled to receive above property will sign this duplicate receipt before the property is removed. Custodian must keep this on file.

Duplicate Receipt.

Office, 217 First National Bank Building, Chicago, Illinois.

Valid only when signed by the President or Vice-President, and Secretary or Treasurer and the Seal of Company affixed hereto.

RELEASE.

NATIONAL

STORAGE COMPANY.

full Number.

Warrants released in part hereby as follows: .....

No.....to the order of ..... Releasing. .....

....

issued for ....

....

To .....

Custodian of Warehouse Premises No..... .....

At .....

The NATIONAL STORAGE COMPANY has this day received and Cancelled

endorsed its Storage Warants No....., and all

a portion of the property covered thereby is hereby released, as follows:

.....

.....

Upon presentation by the proper parties, of this Company's removal permit of even date and Warrant Number duly endorsed, you are authorized and directed to permit the removal of the property hereby released, removing such locks, seals, cards, signs and other marks, evidences, methods and means of possession and security as relate exclusively to the same, and such others temporarily as shall be found necessary to permit the removal of the released property, but only at and during the time of its actual removal, which must be under your supervision. Before the property hereby released is removed, the Receipt hereon must be duly signed by .....

NATIONAL STORAGE COMPANY.

By .....Pres't.

Date.....

..... Treas. Sec'y.

..... Received this day of the

NATIONAL STORAGE COMPANY the property hereintofore released.

.....

Property hereby released duly delivered.....

Custodian.

Custodian will please have within receipt signed, certify to delivery of property and return this at once to this office.

Office, 217 First National Bank Building, Chicago, Illinois.

WITNESS (continuing): I went there on an average about five or six times a week. It was customary to check over the goods stored there on those trips at least two to three times a week. Go over each lot, take from the book I had the lot number, and see that the tags were on there and the stock all right. I saw them on an average about twice a week. I said two or three, but
204 maybe not more than twice a week. I should say I did this for the last time prior to the failure of Rodgers about Thursday or Friday, that is, the second or third of May. He failed on the 8th. At that time I found the warrants covered all the bags there, and found in the location the goods called for by the warrants and by the attached card. They had not been moved about or disturbed. I next saw them on Friday, the 10th, that is, all of them. I saw part of them going to the office on the afternoon of the 8th; saw a portion of them on the second floor at that time. I was last there prior to the filing of the petition in bankruptcy upon the 7th; was then in the warehouse. Did not make a thorough inspection at that time, but inspected in, I think it was, three
205 car loads—two or three car loads. They are among those that I testified to having inspected. That is all I did at that time; did not go over the property. The next time I went over was on the afternoon of the 10th. I found them all intact. I went over them with Vaas, the book-keeper for Rodgers. The original tags that I have described were intact. I found all the bags there practically as they should be. They were in the divisions and sections called for by the card, and the original tags that I had placed
206 there were in their places. It is my knowledge that the bags were in the same places where I first placed them upon the lots or piles. None of the lots had been removed from the sections in which they had been inspected into the warehouse. They had not been disturbed in any respect, except I think there was one lot of 351 bags of timothy seed on the fifth floor. The bags back at the south end next to the window had been pulled down, that is, pulled away from the windows, that is all. They were piled up in front of the window to start with, and had been thrown back on top of the piles, but all the bags were there. About half a dozen bags had been thus removed, I suppose for the purpose of raising
207 the window, something of that kind. They were all there, and

simply had been piled up on top of the others, but in all other respects they were as first inspected in. In some cases the goods mentioned in a warrant were placed there in one single section. Each car lot of 300 to 400 or 500 bags could not be put in one section without running over into the other. There was one lot right here of 481 bags of buckwheat, Lot 46, Warrant 9194, contained in fifth floor in Division B, Sections 19 and 20; that was piled in the same manner that the smaller cars were, only in two more piles; that would be four piles instead of two, in all probability. I cannot say exactly how they were piled, but that is the manner of piling large cars into three or four piles in place of two.

In that instance a tag calling for the full amount in two sec-
208 tions, 19 and 20, was placed upon them. As to the warrant, the card was written for the same and calling for the amount in Sections 19 and 20, whatever the numbers might be. About 250 bags went into a section, sometimes 251, 252 or 253, where a car lot would be that large. I could not say how many times I visited the premises since the filing of the petition in bankruptcy; half a dozen, I should think; I cannot say exactly.

210 (Witness temporarily withdrawn.)

F. H. Jones, sworn on behalf of the National Storage Company, examined by Mr. Heckman, testified as follows:

211 Am financial man of Allen, Kirkpatrick & Co., of Pittsburgh. These seed, and the endorsement on these warehouse receipts shown me were a purchase outright and not a loan. The goods were paid for in full by our firm to Alexander Rodgers, and receipted by us on those certificates, on the 8th day of May,
212 by draft attached, or rather these warrants were attached to the draft which accompanied them. We issued our own check for the face of the draft, and of course the drafts and warrants were surrendered to us by the bank. We paid the draft on the morning of the 8th.

(Signatures to the warehouse receipts and draft testified to, admitted to be signatures of Alexander Rodgers and of National Storage Co.)

One of the warehouse receipts, No. 9437, is introduced in evidence, dated May 7, 1901, for 250 bags of timothy seed, said to weigh 29,341 pounds, contained in Division E, Section 6, second floor, of the premises in question, and was issued to the order of Alexander Rodgers and endorsed by him; the first lot, No. 63.

The other warehouse receipt testified to was introduced in evidence, No. 9438, lot No. 64, dated May 7, 1901, for 250 bags of

timothy seed, said to weigh 31,326 pounds, contained in Division E, Section 4, second floor, of said premises; issued to the order of Alexander Rodgers, and by him endorsed.

213 The draft testified to was also introduced in evidence as follows:

"No. 1107. Alexander Rodgers, Seed Merchant, Chicago, May 7, 1901. On demand pay to the order of the First National Bank, Chicago, Illinois, $2,317.18/100 Dollars.

2 cent (Sd.) ALEXANDER RODGERS.
Revenue Stamp.

To Allen, Kirkpatrick & Co., Pittsburgh, Pa. And endorsed on the back paid. Also, "Pay to the order of the First National Bank. May 7, 1901. First National Bank of Chicago, R. J. Street, Cashier."

WITNESS (continuing): The bill for the goods handed me did not accompany the draft. That came in the usual mail; it usually gets in before the draft. Invoice was mailed and reached us there at the other end. The draft, of course, goes into the bank here and is then forwarded by the bank here to Pittsburgh, and then it is presented to us by the bank's messenger; that is the way we have the invoice before the draft is presented to us.

214 *Cross-Examination by Mr. Paden.*

I cannot answer absolutely when I got that check in payment of that draft. The Chicago drafts are always presented to us earlier than drafts from other points. This only happened ten or twelve days ago. I could say positively that we paid it before noon. I signed the check that paid it. It was on May 8th, the day following the date of the draft. My best recollection would be that it would be some time between ten and eleven o'clock in the morning when we paid the draft. The banks at Pittsburgh open in the morning at nine o'clock, that is, not all of them, but several
215 do. Our office is between five and six short squares from the bank, not like some of these squares here; would not be five minutes' walk from the First National Bank to our office. When I say between ten and eleven o'clock I mean Pittsburgh time; that is about an hour earlier than the time here; in other words, ten o'clock Pittsburgh time is nine o'clock, Chicago time. I am not giving my answer from independent recollection, but from what the general run of business is. I could not state absolutely in this particular case. I do know whether the check was paid at ten o'clock or one o'clock, because these Chicago drafts never reach us after noon; they are always presented to our office for payment be-

fore lunch time. It might have been twelve o'clock when it was there, but they are always in before that. I would not know
216 from our check whether it was the 8th or 10th that the draft was paid, but there is an endorsement on that invoice of Mr. Rodgers' which should corroborate the date as the 8th. The check now handed me is the one with which we paid that. That is signed by me.

WITNESS (continuing, questioned by Mr. Eschenburg):
217 Mr. Scott, the managing partner, bought this seed by wire on May 6th. There is a copy of our telegram (producing same). I have not Mr. Rodgers' telegram. This telegram of ours was in answer to a telegram or letter of Alexander Rodgers; I could not state which.

Telegram referred to read in evidence as follows:

"May 6, 1901. Alexander Rodgers, 32 Traders Building, Chicago, Ill. Yes, will take two cars. Send bill and draft. Hold seed. Allen, Kirkpatrick & Co."

WITNESS (continuing): We never sent any instructions to Mr. Rodgers after sending that telegram countermanding that portion of it which said "hold seed." The next thing that we knew after sending the telegram was a presentation on the 8th. I
218 would not be able to say whether we received the invoice on the 8th. Presume we did, because it is dated the 7th, and it has our endorsement as having been paid there on May 8th, so I presume that we received it on the 8th. It may have come in at midnight or some time. This endorsement in red ink, "Paid," was made by one of our clerks. I did not see any sample of the seed. I believe the seed that we used was always one grade; I would not be able to say what we used or what that was. Mr. Rodgers had been selling us seed for years and he knew just what we wanted. I do not know that when he sold seed to us before he would get a National Storage certificate in many cases and hold our certificate himself, because ordinarily our seed was ordered out at once. I think we had only one instance in which the storage receipt figured, and in that particular case the warehouse receipts were sent to us. Now, that is my best recollection. I think we had but one storage transaction prior to this one, and then the storage re-
219 ceipt, with the insurance policies, came to us. We usually insure these goods. We instructed Mr. Rodgers at the time these particular goods were bought, or shortly after that, to insure them. That was shortly after these proceedings began, because we wrote a letter to Mr. Rodgers instructing him to insure. I think I have a copy of the letter, if I am not mistaken. We have no representative here in Chicago. The letter handed me is the letter

from Rodgers to me, under date of May 4th, offering six cars. In the first letter I spoke of a telegram. There is a copy of that letter asking Mr. Rodgers about the insurance (producing same).

Letter read in evidence as follows, and marked "Jones' Exhibit 4."

"CHICAGO, Ill., May 4, 1901.

Allen Kirkpatrick & Co., Pittsburg, Pa.

GENTLEMEN: Nothing from you unanswered, but I want to tell you to wire me Monday morning to ship one or two cars of
220 timothy seed at same price as you last purchased. Will offer you a bargain for particular reason, as I am sure it is going to make the money. I do not offer you but two cars at 3.45. That is an advance on this option within a week of 20c per hundred pounds. I do not usually talk through my hat, but I want to do you a good turn, and I am sure you can make money. This offer is only for acceptance early Monday morning, so just do as I tell you and you will be all right.

Yours truly,

ALEXANDER RODGERS.

P. S. Would like B. & O. shipment at prices which I have named."

WITNESS (continuing): Prior to the receipt of this letter we had received no information at all that Rodgers was getting pretty hard up financially. We had no information of that kind. The seed was spot cash. The price paid was the market price, and it was paid for in the usual way. I think we sent the telegram the
221 day after we received the letter, because his letter to us was dated the 6th and not the 4th. His letter to us was dated the 4th, but our message to him bears date the 6th of May. The 4th was Saturday. We saw no sample of this. As I stated some time ago, we use the same quality of seed, and by that means was able to ascertain the value of the seed. It was a matter that Rodgers understood. Nothing said whether it was prime or practically prime. Seed men know those terms. It was the seed that we had been using. I do not know whether that was Rodgers' grade "O." Don't know anything about seed myself, except that I know timothy seed occasionally when I see it. There is a great difference in the value of various kinds of timothy seed, according to sample. I know
222 that we always bought the same grade of seed from Rodgers. He knew what we wanted, and what we always insisted upon having, and most of our seed bought from Rodgers, or bought from any of them, was one grade. We are wholesale grocers. We use seed for field seed. I suppose we have the largest business of that kind in the city. It would depend on weather. Are accustomed to buying two carloads at a time at this time of the year. I suppose

that sometimes we have bought anywhere from five to ten or fifteen cars; possibly not at this time of the year. We thought it was a "buy" and bought it. Two cars is not much. It was not unusual for us to buy that much at a time at this time of the year. We did not often receive letters from Rodgers inviting us to write him for any special quantity of seed. We were getting the market all
223 the time from Rodgers and from the Dickenson people. We tried to keep posted on the seed market. We had received letters from him before containing such a bargain as this, thinking that the market was in proper condition to buy. He was a seed man, and we naturally would pay some attention to his advice. I think no telegrams passed between our firm and Rodgers after the receipt of the letter of May 4th just offered in evidence and before the sending of the telegram which was offered in evidence. We made no inquiry as to what the urgent purpose was in that letter to have us telegraph for that seed. It was just an ordinary transaction so far as we were concerned. The seed business is done entirely by telegraphing orders; in fact, during the season we get
224 the market every day by wire.

May 25, 1901.

W. W. WILSON, sworn on behalf of The National Storage Company, examined by Mr. Heckman, testified as follows:

Am a lawyer, connected with the Chicago Title & Trust Company. Have charge of the receivership and most of the trust matters that come into our office, and have charge of the receivership of this bankrupt, Alexander Rodgers. I have not the lease with me between Rodgers and the National Storage Company. Do not
225 know whether the paper handed me is a duplicate or not of the lease marked Exhibit . It was a lease very much like it. I know there was a lease between Rodgers and the National Storage Company. (Witness shown another paper.) This purports to be a lease. Mr. Bard, my custodian, brought it to me from the premises with a bundle of other papers. I heard him testify the other day. It was the same bundle that he testified to having brought to me from the safe of Rodgers the day after the petition was filed. The day he testified I went to my office and looked up this particular bundle to see whether or not there was a lease in there, or paper purporting to be a lease there, from the storage company to
226 Rodgers, or otherwise, and I found such an instrument in that bundle of papers at that time, and it was the first time that I had seen it. To the best of my recollection the one I found is a copy of "Exhibit A." It was the 22d of May that I found that

paper; that was the first time that I had examined the paper. I don't remember the day it was first in my possession, but it was delivered several days before that and at the time testified to by Mr. Bard. He brought it in and handed it to me as one of the papers found in the safe, but I did not examine the papers to see what was in them.

E. C. RAND resumed the stand:

227 *Examination by Mr. Heckman.*

As to what constituted what I did in connection with the inspections and with each of them testified to by me yesterday, in making the inspection of the applications for storage warrants submitted to me yesterday, I counted the bags and verified the section, position, floor and lot number, and placed a tag on the front of the lot,—front of the pile, in each several instance. Prior to that date
228 I placed tin enameled blue signs on each floor, with the exception of the sixth. The size of the sign was 3x7 I think. The one you hold in your hand is the sign. In each instance there was printed on that sign, "This property controlled by the National Storage Company as public warehousemen. Warehouse premises No. ....., Lot ....." The number of the warehouse premises was 281. From that time till now the number of the warehouse premises continued to be 281. That was put upon each of the tin signs put up. I think I put eight of these signs upon the premises; could
229 not be positive. There were two in the basement, one on the north wall, and one on the beam at the front of the north section. I don't remember where the sign is on the second floor. On the third floor there are two on the north wall. On the fourth there is one on the north wall. On the fifth there is one on the north wall and one on the west side of the south bin. They were placed about seven or eight feet from the floor, so that they came a foot or two above the piles of bags. It was sufficiently light there so that they could be easily read in each instance. It is not as light in the basement, of course, as on the floors above, but on the upper floors they are very easily seen and read. At times artificial light
230 is necessary for the transaction of business in the basement. It depends upon the time of day. I would not be sure whether they have any lights there, electricity or otherwise; think they have. There was one sign on the fourth floor on the north wall, I should say eight feet from the west wall. There are windows in the west wall. They made it very light. On the fifth floor one sign was in about the same position as on the fourth; would not be posi-

tive as to the other. I said there was a sign upon the fourth floor. Am not positive whether it is on the bin on the fourth floor or on the bin on the third floor; there are two signs there. In one case the two are on the north wall, in the other case one on the bin and the other on the wall. Would not be positive about which floor it is of these two. Those other signs I placed there on August 31st, when I went there, or the day before; my impression is it was the day before. The signs are still there and have remained there
231 continuously from the 31st day of August until the present time.

Q. Mr. Rand, you were interrupted last evening when you were about to answer a question as follows: "How often have you visited the premises since the filing of the petition in bankruptcy?" A. Half a dozen, I should think; I cannot say, exactly.

WITNESS (continuing): I visited them last this morning. I found the goods there, so far as I found this morning. The lots are there. I was not all over it this morning. Yesterday afternoon was the last time I went all through the building; they were all there at that time. At that time there were two employes of the National Storage Company there. They are custodians of the property of the National Storage Company.

232 (Motion to strike out the answer as a conclusion.)

The REFEREE: Suppose you designate him as the representative of the National Storage Company.

Mr. HECKMAN: We have no objection to that.

WITNESS (continuing): They were representatives of the National Storage Company. They went there the 10th of May. I went there in the afternoon of that day. Mr. Tod, the treasurer of the company, sent them there to relieve me, and they, or some others, to take their places, have been there ever since continuously, day and night.

Cross-Examination by Mr. Eschenburg.

I should say it was, on an average, about five or six times a week that I have visited those premises since Rodgers first
233 commenced doing business with us. Did not always examine all the goods there each time I went, but made a full examination once or twice a week. Before any receipt was issued on goods I went there with the application, and valuation memoranda was delivered to me by Rodgers or some of his representatives. Then I counted the bags which were there in each instance for which the receipt was filled in; counted all the bags, and in some cases examined the contents. Do not know, as a matter of fact, whether the

contents of all the bags corresponded with the application. I could not say that as to all of the bags. Later on, when I visited the same
bags again in order to see that everything was all right, I
234 counted them again. Counted the outer layers, and estimated
what was there. I had no means, by a mark, or anything of that kind, of knowing whether the same bags were there that had been there when the receipt was issued; do not think they could be changed, though, without my knowing it. I do not know, as a matter of fact, that changes were made—that other bags were substituted under the same receipt. I never ascertained that. I have seen the book handed me, the storage book that Rodgers kept. I never examined that in connection with my work there. That is
my memorandum there (indicating); did not use it myself.
235 I can tell from the application, dated February 19, 1901,
whether I inspected warrant No. 9224 for 250 bags of timothy seed. The weight is 31,892 pounds. Those goods are still there.

Q. Do you not know that, as a matter of fact, the bags have been changed and that the goods that are there now, the bags, weigh an entirely different number of pounds?

(Objected to as immaterial; overruled.)

A. I do not.

Q. Is there any memorandum on any of the bags by which you can tell that the identical bags which were there on February 19th are there now?

Mr. HECKMAN: Objected to. I think we will object to this
whole line of evidence as immaterial at this point; the reason
236 for it we will give later.

(Objection overruled.)

A. No, sir.

WITNESS (continuing): Cannot tell whether any one of the bags which is there now is the same bag which was there on February 19th. I suppose changes might have been made by Rodgers and his employes without my knowledge. I suppose it might have happened. All I know is that at the place in the warehouse where these bags were on February 19th there are now 250 bags, and that there is a card on one of the bags from which I judge that this is the same lot that I inspected. I do not know positively whether it is
the identical car that was there at that time; I suppose it is.
237 that is all; I have every reason to believe it is. The cards do
not give the weight. When I inspected out any goods Rodgers did not make a written application, or verbal. He presented the warrant at our office, that is, delivered it to the office, then a release and a removal permit were issued for the contents and face value of the warrant, and they were taken to Rodgers' place on

Johnson street, and I went to the lot of bags called for in the release, division, section and floor number, and the lot number, took the tag off and had the release and removal permit signed. The removal permit is obtained by Mr. Rodgers for the pile, and the release taken back to the office by me and put on file. The release was never issued and delivered by us before the examination of the goods, nor was the release ever executed before the warrant had been delivered to us. The release bearing date May 7, 1901,
238 relating to 221 bags of buckwheat seed, said to weigh 26,470 pounds, has my signature on it. I inspected out that seed on May 7th. Am not sure of the time of day. May be able to tell you, do not know whether it was in the morning or afternoon. Can see by the expense book (referring to memorandum book). I should say it was about noon, am not positive about that; do not know. The warrant number is 9226. At that time this warrant was at the office. Did not see it that I know of; I might have happened to; I don't remember exactly the instance. Will tell you about it in this way: The reason I do not remember it is, I might have opened it, and that warrant turned in there, and a release and removal permit made out by the stenographer, signed and laid on my desk. I had them copied and I took the release and removal permit to Rodgers. I never saw the warrant until I might file it or cancel it on our books in the evening or late in the afternoon. My signature
239 is not on that original warrant No. 9226. That is my writing. It is rendered by Alexander Rodgers. It was canceled May 7, 1901. The name "Alexander Rodgers" is in my handwriting. I wrote it on there some time on May 7th, I should say. I suppose that was in my possession, or the possession of the company after May 7th, I cannot say. If I had seen it and knew that was the warrant before I went out, why that was all right, if the release and permit were delivered to me, but they were never made out before the warrant was delivered. I wrote the words "Alexander Rodgers" before the words "Canceled May 7, 1901, surrendered by . . . ." It would be done on May 7th by Alexander Rodgers unless by some bank. It would be Alexander Rodgers, because that was the man. If they had been endorsed by the bank, or by H. W. Rogers, who held it, who wanted the seeds, the warrant would be turned in and be surrendered by the parties carrying it in. This does not refresh my recollection as to the date whether that was actually can-
240 celed on May 7th or not. I do not know, as a matter of fact, that this warrant came into our hands after these bankruptcy proceedings were commenced, after May 8th, and was canceled then. I will swear that I had that warrant before May 8th. Am sure of that, as positive as can be that I saw it before May 8th. The application of May 7, 1901, handed me, I should say, was inspected by me at the same time that the other lot of buckwheat was released

on May 7th. That was about or a little before twelve o'clock. There was no release on that day as to this timothy seed that I remember. The release referred only to buckwheat, and this is
241 timothy seed. As to the time in the day when I made my report on that timothy seed to the office, it is very frequently that I was down there; Mr. Rodgers would telephone, or one of his representatives, saying they wanted some warehouse receipts, and I would go down there and get an application and valuation, and telephone to the company that I had inspected it in. The fact that this was the day before the petition in bankruptcy was filed does not help me to recollect that day. Had been down there so often that it is hard to remember one from the other. I think it was about noon of May 7th that the warrant for this timothy seed was issued. I should say that the body of the application is in the handwriting of Vaas, Rodgers' book-keeper. He delivered it to me. That does not refresh my recollection as to the time. I think I made a report to the officer by telephone in that case. All the floors were
242 covered by the lease from Rodgers to the National Storage Company. The cancellation of the warrant I alluded to is the puncture holes through the name of the president and treasurer, and sometimes the other is put on later. The "May 7, 1901" is another, an extra cancellation. I said on my direct examination that I
243 was at the warehouse on the afternoon of the day of the failure.

Cross-Examination by Mr. Wyeth.

I saw the two exhibits here produced, called "Small Exhibit A" and "Small Exhibit B." The words, "Owner W. H. Small, Louisville, Ky.," written on the card "Small Exhibit A," I have every reason to believe were put on by Vaas. I saw him writing something on the card at the time that I went there. I went over the National Storage Company stock on the 10th of May with Vaas and Bard. Vaas wrote something on the bottom of the card at that time, and also on "Small Exhibit B." That was May 10th. Vaas is the one referred to, and was in the employ of Alexander Rodgers. In the body of Small & Co. Exhibit A, the writing written in there is in Vaas' handwriting, I suppose. I should say it
244 was not in the handwriting of Alexander Rodgers. It is my impression it is Vaas'. Could not say that. I refer to the ink writing. Would say the same with regard to Small & Co. Exhibit B. This along at the bottom of these cards as to the owner was not upon either of these cards prior to the 10th day of May.

Spent fifteen to twenty minutes in the Rodgers warehouse when I went there the day prior to the failure. That is not about the customary time I spent in there on my rounds, sometimes spent more.

When I went over the entire stock it was half an hour or forty minutes. From fifteen minutes to half an hour is the average time I spent there on my visits, then would go off to some other ware-
246 house. Went out to the warehouse after the failure. Took some tags along with me; tags about ten inches by four inches in size, and put them up, one on each lot all over the building of the premises occupied by the storage company. It is a fact that at times when I went out there on my inspections I saw the employes of
247 Rodgers & Co. on the premises purporting to be leased by our company.

Cross-Examination by Mr. McNab.

Referring to Exhibit C, being the application for storage warrant showing 225 bags of timothy seed, weight 29,751 pounds, marked "T. 66795," Division D, Section 6, third floor, I inspected that property there on August 31st. In Division D, Section 6, on the third floor there were 225 bags of seed. That seed is there to-day. I could not swear that that seed which I inspected on the 31st of August is the seed that is there to-day. I put a card on the seed on August 31, 1900. I am not willing to swear that that card was there on that seed May 8th of this year. It is not a fact that I
248 went and put a tag on the seed after May 8th similar to one of these tags; am positive of that. I have no records to show any removals of seed from Division D, Section 6, third floor since August 31, 1900. Two hundred and twenty-five bags would take up a space in Section D, Division 6, of about seventeen and one-half or eighteen feet by seven feet wide. If they put any more bags in there they would have to run out in front. There are no more bags there except these 225. We always make an inspection before warrants issue. I inspected some property on May 7th in the premises there; three lots, 62, 63, 64. It is in the possession of the National Storage Company, given to it by Alexander Rodgers.

249 (Motion to strike out last answer, "it is in the possession," etc.)

The REFEREE: It does not seem to be responsive.

WITNESS (continuing): I inspected certain property on the second floor on May 7th.

Cross-Examination by Mr. Paden.

I am 27 years old. Have been in the employ of the National Storage Company three years. There is no one else there in the office that has exactly the same duties as mine. I should say I spent about half my time in the office and half on the outside work. It would vary sometimes; some days it would be most all day out,

250 and others I would be in the office. The work that I did that I have already described, is what I mean when I say I am a custodian. I have some keys now to 220 to 230 Johnson street, keys to two locks on two doors. One is the basement door, and the other is the key to the second floor. Our custodian, or man in charge for us at the place, also has keys to those doors. Never had any
251 keys before the petition in bankruptcy was filed. As to how I can tell that no warrants were ever issued in favor of Rodgers before the inspection was made, in almost every case I c. ied the release and the warrants. Cannot say every case. Cannot say that I issued the warrants in every case. I do not know that at times warrants have been issued, made out, and signed and delivered before the inspection was made. Don't know of any such cases at all with reference to the Rodgers goods. Warrants were in the com-
252 pany's possession before the goods were released at all times. I never released any goods over there to people holding warrants outside, not to my knowledge. Our releases were all issued and delivered to Rodgers himself. The warrants were turned in by Rodgers in all cases, not by outside parties. The floors in the building were open floors, not partitioned off in any way. There are
253 four bins; two run from the sixth floor down to the cleaning machine on the fourth floor, and then there is a bin running from the fourth floor down to the third, with pipes leading to the second. All the seed that is put into the cleaners I think is taken to the sixth floor. There is nothing done on the fifth and third floors. The bins are closed and they run through. I suppose, of course, it is necessary to use the sixth floor in the cleaning of seeds. There is a lock from the main floor to the second floor, and a lock from the main floor to the basement. I think there are no locks on the doors between the other floors. There is nothing to prevent a man when he is on the second floor from going right on up to the third, fourth, fifth and sixth floors. I could tell by the expense account the number of times since the first of January, I suppose, that I have visited the warehouse. I have not that with me. I have
254 it for a portion of the month of May. During the month of May (referring to memorandum) I went over there five times from the 1st to the 7th.

Cross-Examination by Mr. McNab.

I do not know who filled the cleaner on the sixth floor, not the employes of the National Storage Company. I suppose these were all employes that were doing that cleaning. I don't know who
255 did it. I want to swear that I went out there to visit Rodgers' warehouse five times from the 1st to the 7th of May. I don't

know whether on the fifth or sixth floors there were any other goods kept there usually aside from those that have the National Storage tags on. There are two small lots of bags on the fifth floor. The sixth floor I very seldom visit. The fourth floor is where the cleaning machines are. I have seen at times when going there bags standing on end there. On the third floor at times that I have been there were other lots of Rodgers, other than the National
256 Storage Company, I should say. A similar condition must have existed on the second floor, and also in the basement. These tin signs I said were put up about seven or eight feet from the floor. The only way that these signs would be obstructed would be to stand as close as you could to the front of the pile, and then you could not see them. Standing a few feet from the pile you could see the signs plainly. The piles were about a little over five feet, I think. I should not say six in any case. Am certain they were not six. They were piled seven bags high, I think. Am positive they are seven high in every case in full car lots. Sometimes when there was a smaller car lot they were not piled as high.
257 They were piled seven bags high and ran fifteen bags out from the wall. Seven bags high would make about five feet. As a usual thing we have some tags at the office, and in some cases I take the hook down to the office when I attach a new tag, and in the other cases I take one from the box that we have there. They would have a mixture of new and old tags. They would not destroy the hook when the card was taken off, it would be returned to the box. It would not be easier to take off the hook and put another tag in its place later on unless you take the tag with the hook and put another hook on. I know timothy seed from red top. I
258 do not know millet from red top. I do not know millet seed. I know buckwheat, also clover seed. Know it if I see the seed. I could go into one of their rooms and pick out a sample of timothy seed. Think I could identify timothy seed as against all other seeds if timothy seed was put down in front of me and I was not expected to know what it was. This cleaning was done on the north
259 half of the fourth floor. The machines run through the north half. All of the releases issued by the National Storage Company were directed to E. C. Rand, inspector, custodian, warehouse premises No. 281. I signed the releases, as custodian, and delivered them as inspector and custodian. The cleaning machines are in the north-east quarter of the fourth floor, near and a little bit north
260 of the elevator. I have my memorandum book showing the dates of my visits to the warehouse from January. It will only show Mr. Rodgers' name when there was a release or an issuance of warrants or special trip for inspection. Now, the other warehouse is very close to Rodgers', and it has been my habit to go to

visit both of them when I have been down there. That is, I went into Rodgers' sometimes to see the stock and sometimes to call there at the office, and if I made no special trip and there was no business other than just my inspection and running in there,

Rodgers' name would not appear in this. What appears in my
261 book are the special trips to Rodgers' place for business pur-

poses during month of January. This book would not give you all the times I went to Rodgers', because when I made a trip to the other house, which is not more than half a block from Rodgers', I would go to Rodgers', too. Mr. Rodgers' name does not appear more than four times in January in this book, five times in February and nine times in March. In April it is torn out of here up to the 5th; I may have gone once in that time. I will give you the others; twice is all I find here. The other times that I

stopped in there were when I did so incidentally when I was
262 around visiting the other place in the neighborhood. I went in

there when I had occasion to be in the neighborhood, and did not enter that down in the book. It would not be a special trip against Rodgers' account. But I went in there when I had no particular business in there on the other occasions, to look after stock, occasionally to look over the stock. I do not think, when I come to think it over, that it is considerable of an exaggeration to say that I was there four or five times a week. It was car fare that I charged up. It is not a fact, to my knowledge, that the Storage

Company issued and delivered the warrant to Rodgers without
263 our having first inspected the grain at his place of business. I

cannot say that I know positively that they did not thus deliver a warrant before I turned in my inspection. It was a rule that I was to telephone in before the warrant was delivered. I do not know of any cases where the warrants held by the First National Bank were delivered in the forenoon to Rodgers and I did not go up there to the premises until the afternoon. I cannot say of my own knowledge but that warrants may have thus been delivered in the forenoon and I not make an inspection until afternoon. When I went to the premises to make an inspection it was very often in regard to a pile that I found already intact and in place, placed there

by Rodgers. In many cases I did not know how long it had
264 been there. I have all the tags here, with the exception of four,

I think, which were put in. Have not the two with the writing on the bottom, "Kirkpatrick." With reference to the card handed me of the National Storage Company on lot No. 63, dated May 7, 1901, marked "Rand Exhibit 21," and also the card for lot No. 64, dated May 7, 1901, marked "Rand Exhibit 22," I think the words in pencil, "Owner Allen Kirkpatrick & Co., Pittsburg, Pa.," were written on each card on the 10th of May. I know that Vaas wrote something upon the card; did not notice what it was, when

we were going over the lots together. Vaas put the "Alexander Rodgers" on there. I was in the building when that was done; did not see it; saw him writing something on it, but took no notice of what it was. Vaas filled in the portions that are written in ink.
265 Vaas fills them in and I take and put them on. Vaas wrote practically all of the tags that have been put on with the exception of say fifteen or twenty that came into the office. Vaas never attached the tags to the bags to my knowledge; am sure of that. Vaas did not have in his possession any of these blank tags. They were brought by me and delivered to him, numbered consecutively with the lot numbers, and he has the pins there in the office of the building for attaching the tags to the bags. I suppose Alexander Rodgers furnished those pins. I should say at times I took our own pins down from our office; we have the same pins, and attached a card to a bag with our pins, and left the pins there. The pins are identically the same.

Re-direct Examination by Mr. Heckman.

266 It would not have been possible for Vaas, or any one, to have substituted numbers under our system of marking as to parts of lots, for the reason that these cards are numbered consecutively with a numbering machine which we have in our office. Duplicate lot numbers have never been at any time used in the issuing of warehouse receipts in our warehouse, so that the cards or tags attached similar to these exhibits "Rand Exhibits 21 and 22," bear consecutive numbers from the beginning of warrants issued in our warehouse. The warehouse receipt in the instance of an
267 inspection bears the identical lot number with this that was stamped in our office. We never at any time furnished Rodgers with cards with duplicate lot numbers on. Lot No. 63 identified one lot. There was no other lot ever designated by that number.

Q. And is the same true or not true as to every other card issued?

268 (Objected to on the ground that it is already covered; sustained.)

Q. Please state whether these cards which I hold in my hand, and which are, as I understand you, the original tags put upon the lots of goods and are now in warehouse 281 of the National Storage Company—

268 (Objected to; sustained.)

WITNESS (continuing): I identify the cards that were on the lots of goods in this storage warehouse No. 281, as being

270 the original cards placed there by me at the time of my inspection of those lots, by the stamp. That numbering stamp was on all of those cards that I have testified about. The applications for storage warrants uniformly contained a lot number. I have stated that my memorandum shows the transaction for which I charged against the warehouse. That is simply a memorandum showing—the same books will show the times I have been down there, the number of times I visited aside from those I charged to the warehouse. I had been there sixteen times in January, in-
271 cluding those I have already testified to; seventeen times in February. Sixteen times in January, altogether, eighteen times
272 in February, twenty-one in March, eighteen in April. My
273 object in going to warehouse No. 281 on those occasions was to make these inspections of the property. I wanted to inspect the property to keep track of it, that is all; to know if it had been tampered with, and when I went in there, as a general thing,
274 I went on every floor and looked at every lot. With the exception of the one case I told of Saturday, in regard to the bags being thrown back from the window, I never saw anything to indicate that there had been any tampering at all with any of those bags. There was nothing to indicate that the bags had been opened and seed abstracted, or that there had been any substitution of other bags.

Mr. HECKMAN: What do you mean when you say, "and were charged to the warehouse?" charged your car fare?

(Objected to as having been already testified to; sustained.)

275 WITNESS (continuing): The only way that you can tell where those sections and divisions are is from the signs that were in the building. I made these plats showing the relative location from the premises. As to where Section 6 in Division F is in the warehouse No. 281 as shown by the signs about which my testimony has already been given, I had better give the history of the section as to about what it would be. The sign hangs over the
276 center of it, starting from a point twenty-eight feet east of the north-west corner of the basement, running twenty feet south to a line seven feet, east to a line twenty feet north of the wall; the signs hang directly over the center. It would be about three and a half feet from each of these points.

The west line of that section is twenty-eight feet from the west line, and Section 4 of Division F is about forty-two feet east from the west line. The sign upon Section 4, Division F, is placed
277 about forty-five feet from the west wall, directly in front or twenty feet from the north wall, directly over the section facing south and out. It is on the front of the section. That is true

of the sign over the third section in warehouse No. 281, and also of section 6 I described. Am able to locate from the signs each of the sections, can go right to them.

Q. Could any one not familiar with the warehouse go in?

(Objected to; sustained.)

278 WITNESS (continuing): Section 3, Division B, fifth floor, as shown by the signs, commences fourteen feet from the west wall, at a point on the north wall; runs south seventeen and one-half feet, east seven feet to a point, north seventeen and one-half feet to the wall. The sign hangs in the center of the section. In some cases the corners of the section are not indicated. In the section referred to the corners are on the seventeen and one-half feet south of the north wall. I am giving the point on the post from that; fourteen feet east of the west wall there is a post. This bounds Section No. 3 on the west corner. The south-east corner is not bound-
by a post. The north end of that section is bounded by the
279 wall of the building. The east end is bounded by an imaginary line. The south-east corner is bounded by an imaginary line; it is on a line with the posts, an imaginary boundary. I am not going out of the room to find that corner, it comes out to a line of posts running right through the building from east to west. There is not a post on that corner. The sections are smaller in subdivisions than are indicated by the posts; they are sized to con-
tain a car lot of seed. The line is half way between two posts.
280 There is nothing on the wall to show where that half way is found. That section is half the space between two posts. I judge it is bounded by the wall, that is all. The wall is there, it runs right straight through. There is nothing to indicate the dimensions or number of feet. You can go in a certain direction to get the boundary of a section, but a car lot would only fill up so much. It would fill that up in that way—just what there is in a car lot,
250 bags. That will fill up a space, as I have stated, 7x17½. The whole space between these posts would be fourteen feet, and
281 the posts are seventeen and one-half feet from the wall. A section takes a half of that, that is to say, 17½x7 feet. They are long strips. That is uniform all through the building with very few exceptions. The exceptions are occasioned by the elevator. They are north of the elevator. There it will be a wider section and not so long; that is because the bin cuts into it; there is a bin right in front of the section. None of the signs are on the posts, they are all above the posts. A stranger going into a building
282 would see, for instance, Division B, Section 16. He would be walking north and would be assuming that the southern division of that section would be near the elevator, where that sign would be. He would not know except by the sign directly over the post

whether it was half way to the next post or all the way. That is indicated by a line on the floor as well as on the ceiling. The
283 spaces between the posts the fourteen feet wide by seventeen and one-half feet long, and a section would be $17\frac{1}{2}$x7, $17\frac{1}{2}$ feet from the wall and fourteen feet east and west; that is, fourteen feet wide east and west and seventeen and one-half feet north and south between the posts. Supposing he wanted to identify some grain in Division B, Section 10, Division B indicates the fifth floor. A is the sixth floor, B the fifth, C the fourth, and so on. There
284 are about thirty sections, I think, on the fifth floor. There is a row on either side. There are some running the other way down the middle and abuting each other, facing out from the west wall. As to a man finding Section 10 on that floor, he would walk from the stairway until he saw some section number, and follow that section—5, for instance, until he got to 10. They are numbered consecutively right straight around. No. 10 would be indicated on the rafter; No. 9 would be this side of it; that would also be on the rafter. The numbers of all the sections are on the rafters. The
285 ends of the sections are not numbered, but just the front of them. He would get to the end of the boundary of a section, if the front is numbered so and so, by going seven feet to the end of the section and then going to another rafter with another number on it. These signs are about seven feet apart, that indicates one dimension. As to the other dimension, each of the signs are about seven feet apart running through the building, the first one about three and one-half feet from the west wall, and then running along seven feet from each other to the end. That would be half way between that and the next sign. Every section has a number on a rafter, and the only indication is "A," "B," and so on. A stranger could find Section No. 10, for instance, in just the same way
286 as if you stand in the hall and see your name on the door this way (indicating); you would walk in this way instead of going the other way for it. If there are two rooms and the door of one room had not your name, you would go on to the next. A better illustration would be, if a man came to the door, 714, and wanted to go into door No. 716, he would follow along until he reached 716. As to how a stranger would know where that 7x$17\frac{1}{2}$ was situated, the section goes back to the wall, the wall is the end of it. The posts would give assistance in finding these boundary lines, because they are the corner of every other section. There are two sections between four posts, or the wall and two posts it would
287 be. There are posts in the wall, come to think of it, and the lines between the posts would furnish the boundary lines of two sections. That would be the boundary lines for two sections, and the boundary line or space between those sections would be indicated by the sign on the rafter, and where the section runs to the

wall then the wall would be the boundary line. I know how far apart those signs were. I am testifying to the indications furnished by these signs. The sign over Section 1 is three and one-half feet from the west wall. The sign over Section 2 is seven feet east of that. The sign over Section 3 is seven feet east of the sign over
288 Section 2; it would be seventeen and one-half feet from the west wall. I had two of those tin signs in the basement, two on the fifth floor, one on the fourth and two on the third floor. I put those signs on the fifth floor back on the wall above the piles, as I stated yesterday. At the beginning where we commenced to store I went over and placed the signs there on the wall before
289 we commenced to store. The tin signs were put irrespective of sections. I put some up against the bin, on one bin on each floor. On the north wall, the rear or north side of the building, not the rear end, the north side.

This is an east and west building; the building fronts west. The doorway to the floors above is on the south side going up the stairway, and the tin signs are on the north wall right about opposite the stairway, just about sixteen feet away from the stairway.
290 There is one sign eight feet from the window on the fifth floor; on the third one, I should say, twelve to thirteen feet away from the window. There are windows on those floors not more than nine or ten feet apart all the way round on all the sides except the north. It is a large building, divided in two by a wooden partition on the north. There are windows on the three sides, nine or ten feet apart. We could not get our signs more than ten feet apart on the west wall. This wooden partition partitions this from the other part of the building. This is the Electric Company's building, I think. There was one sign on the north wall about ten feet from the west window, and one in the middle of the north wall.
291 That would be quite a ways. It is a pretty old building.
292 There are west windows and east windows in the basement. The railroad track runs along the south side. As to tin signs in the basement, one is ten feet from the front and another one in front of that on the door, twenty feet out from the north wall. Those signs on each of the floors are within ten to fifteen feet of the windows. The floors are so well lighted that there is no
293 trouble about anybody going in to see by daylight.

Section 30, Division B, is an interior section not against the wall. A line of posts runs through the center. The sign over Section 30 is about three and one-half feet south from the center line of posts and about twenty feet from the west wall. It faces west. As to the location of the center, these six sections in the heart of that floor, Division B, two of them run seven feet south from the center line of posts, and two of them seven feet each—fourteen

294 feet—to the north of the second center line, taking in four that way. Sections 13, 14, 15 and 16 occupy a space fourteen feet north of the center line of posts, and about thirty-five feet long, and commencing twenty feet from the west wall. In placing the bags in the sections having their signs seventeen and one-half feet south of the north wall, for instance, the bags are piled against the wall from the wall south, right straight up solid to the wall, and piled out until you got right under the sign, in almost all cases.

Re-cross Examination by Mr. Eschenburg.

In regard to these interior sections, Section 30, for instance, there is a post to indicate the north-west corner of the section, and an imaginary point to indicate the south-west corner, also an imaginary point to indicate the south-east corner; perhaps an
296 imaginary line to indicate the north-east corner, and perhaps a post, I don't know. In reference to Section 15, the north-east corner is bounded by an imaginary point; the north-west corner in the same way; the south-west corner by a post, very likely, and the south-east corner by a post. As to the next section, 16, the north-west corner is an imaginary point, the north-east corner
297 the same, the south-east corner the same, and the south-west corner the same; so as to Section 16, the four corners are imaginary points. As to Section 15, the north-west and north-east corners are imaginary points, and the south-west and south-east may be posts. The center is seventeen feet. As to Section 13, the south-west corner, the north-west corner and the north-east
298 corner is each an imaginary point. As to Section 14, the north-west corner and the north-east corner are imaginary points, and the south-west and south-east corners are, I think, posts. The parallelogram occupied by Sections 31, 14, 13, 16, 15 and 30, in Division B, is just about the center of the floor. Three of the four corners of the parallelogram are indicated by posts. The signs indicate the section and division number. They were placed
299 up above the sections on the stringer in the middle of each section.

Q. When you went out to this warehouse a day or two after the failure and took these signs and put them up all over the building, who told you to do that; under whose instructions were you acting?

(Objected to; overruled.)

A. Mr. Tod, I think, or Mr. Bouton.

WITNESS (continuing): There is nothing on these large wooden signs, which indicate the sections and divisions, as to whom

the signs belong, or to denote the National Storage Company.
301 There are none of those signs on the second floor.
302 I desire to make a correction in my testimony. I said yesterday, or Saturday, in the course of cross-examination that if a person stood exactly in front of one of those piles he might be able to see the sign. I want to correct myself. I went out and found those signs cannot be seen from the front of the piles very readily—as well as they can a little further off. I mean the blue tin signs tacked on the wall. Referring to the tag dated February 23, 1901,
303 handed me, would say that the lot number is in writing instead of in a stamped number; it is marked over; the number is fifty-four in writing. The card refers to Division F, Section 4, in the basement, and is marked at the bottom, 250 bags, with the words, "First National Bank." The handwriting is the same as the rest of the written matter on the card. It is Vaas', and bears my mark in the corner, "E. C. R." Those initials in lead pencil on there I put on the other day after I brought that to court. That is one
304 of the cards I brought in and took off the piles in Rodgers' warehouse. This card is an instance in which the numbering has been placed on there by Mr. Vaas prior to my bringing it over here. I know there are no other cases in which the numbers have been changed in this way; all the other ones are all right. There was a stamp on there, there is no question about that. It looks to
305 me as if the figure 6 had been changed by two or three strokes. I don't know whether the figure 5 in the 54 has been changed or not; could not say. Don't know whether it is 5 underneath. The figure 5 is not written as smoothly and clearly as the figure 4; it looks as if it might be over an erased place or changed, but
306 the figure 4 in the number 54 is very smooth and plain.

Card was introduced in evidence, marked "Rand Exhibit 23," and is as follows:

NATIONAL STORAGE CO.
WAREHOUSE NO. 281.

This card must not be disturbed or obscured.
Date Feb'y 23, 1901.
Lot No.—~~6~~ 54—Pile No. .....
Div. No.—F—Sec. No. 4. Bas.
No. in Pile—250 Bags.

Timothy
Whole No. in Lot
250 Bags
First Nat. Bank.

The REFEREE: It looks as if it might have been 65. I think I can trace it with the glass and see that it was numbered 65 with a stamping machine.

WITNESS (continuing): The figures put on these tags indicating the lot numbers are put on with a Bond numbering stamp.

May 28, 1901.

308 *Re-direct Examination.*

I have with me the cards that I had with me on the stand yesterday. (Witness produces card with the number "54" marked upon it.) That is not the original card that was placed upon that lot when I inspected the lot of goods. I placed the original card upon lot 54 when it was replaced. This was not the original
309 card that was put on there. I last saw the original card which I placed upon lot 54 at the time it was inspected—upon that lot—on the morning of May 10th. I testified yesterday that this was one of the original cards. They exchanged these in court, and I didn't notice the number on the cards. I took the National Storage card and took this in its place, but didn't notice as to the number being written in ink. The original number was 54 on the original card. I don't know where that card is, and have no means of
310 knowing. That is a duplicate or copy of the original card that was placed there, with the exception of the lot number. The lot number on this card is written in ink. On the original card it was stamped with the metal stamp of the National Storage Company. That I testified to yesterday. The card that I hold in my hand was stamped by our stamp with the number 65. I said
311 yesterday that no cards went out of our place excepting they had on them a stamp. The pile of cards stamped up to 100, I think, possibly higher, but my recollection is 100, were taken to Alexander Rodgers. The cards were made out at the same time the applications were, and we placed the cards upon the piles as they went in—as we put them in storage. I took this card and lot number, section, division and floor, etc., and the number of bags, and inventoried the stuff and put the card upon the front of the pile. We only issued sixty-four lots to Alexander Rodgers during the time they have been there. No. 65 was stamped by us, and here is that card. It was with the pile at Rodgers' office and never used. Of course, I could not identify the number. The other
312 writing on the card is Mr. Vaas'. The card was left there and never used by us, but it now appears to be used as a duplicate of No. 54. Don't know where the original No. 54 is. Have no information whatever as to where it might be found, and have no information about it whatever. The original lot number placed on that card was No. 54, stamped with our number machine, testified to yesterday, the identifying numbering machine. Were in the habit of numbering cards up to 100 and leaving them over

313 there with the stamp numbers on there, then Vaas could fill in the body of the card when a lot went into storage. There was nothing to prevent him from filling in the writing on one of our numbered cards and going and pinning it on a pile himself. I have no personal recollection of the card which bore the original metallic stamp number 54. Last saw it on the morning of May 10th, when I checked over the goods there. I remember numbering 54 the same as the others. They were all numbered with the number-
314 ing machine. I remember that all of the cards that were there were numbered with the numbering machine on the morning of May 10th. I was there checking over the cards and the lots, counting the bags. I can give you many of the numbers that morning; I remember all these cards that were numbered. I remember that particular number was on that particular card. I have had some talk about this card since yesterday afternoon. I was not able to explain to the court yesterday morning how that number 54 came on there, and I cannot explain it now. I remembered that numbered card at that time, and the circumstances connected with it, just as much as I do now. I testified yesterday morning that it was an original card, and now say that it is not an original card, because I didn't look over the lot I had. I didn't look over each card when I brought them here. I took them off the pile, and supposed they were all original cards. These tags were all placed on there by me and not by an employe of the bankrupt. I have never discovered any of those tags with the name of our company that were placed on any bags there and not placed there by myself, except in this instance, of course.

WALTER TOD, recalled on behalf of the National Storage Company, examined by Mr. Heckman, testified as follows:

317 Warrant No. 9436 for 221 bags of buckwheat, said to weigh 26,816 pounds, contained in Division B, Section 19, fifth floor, in the warehouse premises No. 281, located at 220 to 230 Johnson street, marked "Exhibit R-5," was delivered to Alexander Rodgers after the goods had been inspected by our inspector. The
318 National Storage Company, by its president and treasurer, has issued all the warrants in evidence. As to the delivery of this particular warrant, that was delivered to Alexander Rodgers by myself individually, and previous to its delivery the lot had been inspected. No warrant was ever delivered previous to the inspection of the lot of goods. The expense account testified to by
319 Rand yesterday was never charged to Alexander Rodgers nor paid by him. The National Storage Company does not store

grain in bulk. We do not issue warehouse certificates on grain
320 in bulk, but issue them on grain in sacks; always on grain in sacks, not in bulk. I think the company has issued warehouse receipts on liquors in barrels. We do a general merchandise storage business. That would come under that class. I think we have stored whiskys, am not sure as to that. Don't recall any instance where we issued warehouse receipts on furniture. We do not issue receipts on household goods, do not do that class of storing. If we issued certificates on furniture at all it would be in large quantities; it would be for dealers, manufacturers. We never accept what is called household furniture.

Cross-Examination by Mr. Eschenburg.

Do not recollect what time on the 7th the application was made for storage warrant No. 9436. Applications were made
321 for three storage warrants on May 7th. The paper handed me is the application. It is signed by Rodgers and is in evidence. My best recollection is that the application was delivered by our inspector, Rand; was not present when it was delivered; am not sure whether it was delivered to me when Rodgers came into the office before getting his warrants, or whether it was delivered by Rand as an inspector. I do not always individually receive these applications before I send out the inspector. We prefer to have the inspector receive it at the place of his inspection. I came to send Rand out to inspect the goods on that day from a telephone message. Do not recall the time of day I received the report from Rand. I delivered the storage certificate No. 9436 to Rodgers,
322 do not recall the time of day. I know it was May 7th, because it was the day of the making of the warrant. I recollect that because I executed the warrant myself and delivered it myself upon the day on which I executed it. I recollect the circumstances of delivering it to Alexander Rodgers at the office of the National Storage Company. Do not recollect the time of day. Recall distinctly delivering it to Rodgers. Delivered the other warrant at the same time. I think he did not deliver any old warrants to me at that time. He did not deliver any old warrants to me personally on that day. I saw him, possibly, twice on that day, once I know. Do not recall what time of day it was. It was not
323 after three o'clock in the afternoon. Don't remember whether it was before twelve in the morning. Don't recall the time Rand went out there to inspect. There is no way I can fix the time. I fix the date as May 7th, because I executed the warrant on that day. I fix the date of the certificate by the date it bears. My typewriter inserted the date in the warrant. I examined the

date in particular before I signed it. I always execute these warrants on the day they are dated, in every instance, to my best recollection. Do not always deliver them on the same day. I remember that I delivered this warrant on the same date that it bears.

324 Certainly have a distinct recollection. My best recollection is that I never delivered a warrant to Rodgers except upon the

325 day of its date. Warrants were usually delivered to Rodgers on the day they were executed; I may say invariably; there may have been exceptions. Warrants 9437 and 9438 were delivered at the same time to Rodgers; cannot recall the time of day. He asked me if it was three o'clock. I remember it was before three, because business practically closes with us before three o'clock. Our business is bankable papers, and I cannot now recall any instance where they were delivered after three, except those that go by mail. I never delivered any warrants of Rodgers direct to the First National Bank. Alexander Rodgers never delivered me or sent any message direct to me to deliver any warrants to the First National Bank.

326 Amendment to the charter of the National Storage Company introduced in evidence by Mr. Heckman as "Exhibit No. 1" of May 28, 1901, recorded as Document No. 1,020,897, filed for record October 25, 1888, in the recorder's office of Cook County. (See record page 112, and *supra.*)

ALEXANDER RODGERS, called by H. W. Rogers & Bro., and examined by Mr. Kerr, testified as follows:

Am the bankrupt in this case. The warehouse receipt marked "Exhibit R-5" bears my endorsement. I endorsed it on May 7th, and gave it to my book-keeper, Vaas. That was before eleven o'clock, I think about 10:45 in the forenoon, as near as I

327 can remember, of May 7th. I gave it to him at the First National Bank Building. That is for a car of buckwheat. I told him to take this warrant to H. W. Rogers & Bro. and exchange it for one which they held. I did not see this warrant after I gave it to my book-keeper that day.

June 3, 1901.

Cross-Examination by Mr. Paden.

328 The only business that I had with H. W. Rogers & Bro. was borrowing money of them, except buying and selling. I bought and sold to them. My business relation with them existed, I suppose, fifteen years or more. Do not know whether I have

had any transaction with them recently before my failure in other matters than the borrowing of this money for which I gave them these receipts. I was buying of Rogers and selling to them
329 and borrowing money of them. Could not tell without looking at my check book whether I paid them any money within the last four months prior to my failure; my books will show that. When I first borrowed this money I gave them National Storage warrants. I had several transactions with H. W. Rogers after borrowing the $5,000; that is, I would take him other warrants
330 which the National Storage Company would give me, on which he would get the same accommodation at the bank, and would take them to Rogers and exchange them for receipts which he had that I wanted to ship out. At the time of the failure some warrants were in their possession which I delivered to them at the time I got the loan. Could not tell how many without seeing. Could not even name them without seeing his storage book, but I assume that he had something of the same, unless it should be for a car of red top, that I know he had. I could not remember any other car without referring to the storage book. There are so many transactions going on that it would be impossible for me to remember it. I would not get the consent of H. W. Rogers first before I sent
331 out the car and then replace that with other warrants. I would get the warrant I wanted to give him, and take it to H. W. Rogers, and give him that warrant for one that he held that I wanted to ship out. It was just a change of warrants. I think sometimes the goods would be shipped out of our place before I got the first receipt from H. W. Rogers & Bro. It was not our practice to ship them out first and then get the receipts, but it was done, as a matter of fact. It would not be half of them that we would ship out first and then get the warrants afterwards. If I sent out samples of seed that the storage warrant was out for, and some there was no warrant issued for, or the buyer accepted the sample that a warrant was issued for, I might order a car and load that car out immediately, and then ask for a
332 removal permit. The time would be very short. Possibly it would take two or three hours, because if I ordered the car the night before and it was set on the track, I would begin loading about seven the next morning, and about 8 or 8:30 the car would be loaded, but the National Storage people would not get down till about 8. Referring to warrant No. 9436, and the transactions relating to the same, I cannot tell what time of the day on May 7th I delivered this application for storage warrant. I do not think I delivered that to them myself. At the same time the application for the storage warrant was delivered to them the valuation memorandum marked "Exhibit FF" shown me was also delivered.

333 I did not receive "A. Rodgers Exhibit No. 1" personally. I should think it was about 10:30 o'clock on the morning of May 7th that I received warrant No. 9436, marked "Exhibit R-5." I received warrants Nos. 9436, 9437 and 9438 together about 10:30 o'clock on the morning of May 7th. I made the application
334 marked "Exhibit S" by telephone. Called up the National Storage Company and told them I wanted a warrant for 221 bags of buckwheat, gave them the weight and location and the warrant and the lot numbers, and the same for two cars of timothy, these for which I got timothy warrants Nos. 9436, 9437 and 9438, I believe. It was some time along about 8 or 9 o'clock, I expect, that I telephoned. As soon as I got the weights, I then went down, when I got my deposit ready to take down to the bank, and a teamster who had hauled out a load somewhere met me there with one receipt. I received that from him, then went up to the National Storage Company and got those warrants. I took two of them, I think, the Kirkpatrick warrants Nos. 9437 and 9438. I
335 took those warrants, endorsed them, and attached them to my draft on Allen Kirkpatrick & Co. Then I handed those to Mr. Vaas, my book-keeper, who was making a deposit, and these also, at the same time. This one to be taken up; that is, No. 9436; to be taken up to H. W. Rogers & Bro. and exchanged for one that they had, and that is the last I had to do with them. This took place some time before 11 o'clock. I generally tried to get to the bank at least fifteen minutes before 11; I very rarely allowed myself or my deposit to reach there at just 11 o'clock. I wanted to deposit it in before the clearing house. The other car of
336 buckwheat, for which I had another warrant, I shipped out on May 6th, the day before, and got my release for that on May 7th. Don't know the time Inspector Rand got out there on May 7th. Do not know whether he had been out there before I went down-town that morning. Cannot answer that. The receipt that I got from the teamster for this car of buckwheat was a railroad receipt.

Re-direct Examination by Mr. Kerr.

That was a railroad receipt for a car of buckwheat. I do not know whether it was for the car that is represented by "Exhibit R-5," No. 9436; could not tell. I shipped two cars
337 of buckwheat on the 6th to Janesville, Wisconsin. Now, whether I got both receipts when I went down there or only one I could not tell you. There were receipts for a car shipped by me, not shipped by them, they were shipped by me. There was nothing unusual about my telephoning to the Storage Company on that morning. That was the ordinary customary way of mak-

ing applications for exchanges of warrants. This application shown me was made out down at the warehouse by us and
338 signed at the time that the stuff was put in storage, and I signed it then and the whole thing was made out together. The application was made as it is made out there, and they were copied at that time. It was made out before I telephoned. Cannot tell you how it came into the possession of the Warehouse Company, whether it was conveyed by me to the Storage Company or delivered to Rand, the inspector, at the warehouse. I said that in this case of Rogers I took out the bags of buckwheat on which he had a certificate on the 6th of May, without first getting it canceled, and then a few hours afterwards I got the cancellation from the storage people, ratifying what I had done. I then gave him new certificates of similar stuff of the same value. I don't think
339 that the storage people knew that I had already taken that stuff out when I went there with the cancellation; no, sir. When I went there with the cancellation I brought to them the old certificates I had from H. W. Rogers. I was in the habit of doing that way; of taking out stuff before getting it released. They did not always know that; no, sir. My contract with them was that I would not touch anything until it was released. There is a like amount there now, same value and same number of bags,
340 on which certificates are now out. Am a warehouseman myself. Don't know what class I am in. I issue warehouse receipts, or warrants, myself. Have been doing that sort of business ever since I have been in for my own account. Since the date of this lease, the date of the lease is January 10th, but I did not take possession of the place, that is, my rent did not begin until January 15, 1899. That was before the lease from me
341 to the National Storage Company. So that at the time I made this lease to the company I was engaged in issuing warehouse receipts in those premises. I had boards up above each section in the warehouse. The floors were lettered, beginning with the top with A. Did not have my name on there; on any part of the outside of the building; it is on the spout leading from the second story to the sidewalk. When I say I did business with the storage people prior to the time when I did business with this other storage company, it was in the name of the Illinois Seed Company. I was president of that company. When I said that one of
342 these warrants that I referred to was No. 9437 I might be mistaken. I could not tell except by looking at the number. I didn't say that it was 481 bags of buckwheat that I released on May 6th. I testified that I shipped out some stuff on May 6th, three cars. I don't know what warehouse receipts covered that property; I would have to see them. I said that I got my release

for the property the next morning. I don't know that I could put it in words how I recall that I did not get the release myself, as a matter of fact, for that property. Why, yes, I know when the release was issued on that property. I know it was released
343 on the 7th. I know it because I ordered it done. Except I ordered our book-keeper, Mr. Vaas; ordered it released on the 7th. That is, as to one warrant. Am referring to the one for 221 bags, or the one that took its place. I shipped out something there that Rogers had a receipt for on the 6th, 221 bags of buckwheat. I know that the release was executed the next day, and that it was ordered issued the next day, because it shows there. I recall the particular transaction by which this was shipped out on the 6th, because I had two cars of buckwheat going out on the 6th
344 to Janesville, Wisconsin, and I shipped them on the 6th. This is one of the cars. Referring to the release, "A. Rodgers Exhibit 1," do not know how I know it.

I had three cars of buckwheat and I sold two of them to ship by sample, and when I shipped them out I had this that there was no warrant out on. I placed that in the store in place of the 221 bags. That is the way I know it. I don't know any other way I can tell you.

Cross-Examination by Mr. Elsdon.

I identify that particular carload shipped out on the 6th as the identical buckwheat covered by the warrant that was already out and that I wanted to get released, because I had samples of
345 it and knew where it was piled, and knew who held the warrant. I had three carloads of buckwheat at that time. I think that was all I had in my place then. I shipped out this particular car of buckwheat covered by this warrant instead of the load of buckwheat that was not covered by any warrant—the third load, because I sent the man three samples and he accepted those two. That is the two that I shipped out. This one he did not seem to want. I know that those two samples were taken from the two carloads that were covered by the warrant, because we kept samples of everything that was in the house in the office, and when we had calls for any sort of seed or grain we went to this box and sent samples, and when the order came back we shipped them out. I don't just know how those samples were marked, but they had an identifying
346 mark on them. They were marked "B" and different figures after the "B." I don't know just what those marks were, cannot recall them now. The number of those samples corresponds with the number on the bags, so that I can go from the samples to the bags and say those samples contain what is contained in the bags, and when I have 250 bags of timothy the contents of those

bags are uniform and represented by one sample, and when I have another lot that may be of a different quality, that is covered by another set of marks and sample, and the marks correspond with the marks on the samples, so that I can go at any time and offer a customer a sample of any lot which I have in my warehouse, on which I have receipts or not. I did not do the sampling.
347 I personally do not know anything, of my own knowledge, as to whether these samples came from the lots represented by these warrants. I never went to those lots and got the samples; am simply taking some one else's word for that, and some one else's marks that they made. I said that I sometimes shipped the stuff out before I got the warehouse receipts that were outstanding against it, and surrendered it, and that the National Storage Company did not always know of that universal practice of mine. I don't know that they ever knew. I meant by "not always" that they were down there. I do not know that they do not know. I suppose the best answer I could make would be that I didn't
348 know whether they knew or not. I am not sure that they ever knew. I am not sure of anything about it. I cannot prove that they knew it.

ALEXANDER RODGERS, recalled on behalf of the petitioner, James H. Patten, examined by Mr. Paden, testified as follows:

Have been in the seed business nearly twenty-three years in
353 Chicago, on the Chicago Board of Trade, but not all the time there. Have done business during that time with the members of the Board of Trade and outside people, too, east and west and in Europe. Have been in business alone since January, 1899. Had an office for a little over a year at 32 Traders' Building. Have had a warehouse all the time at 220 to 230 Johnson street. The paper shown me, marked "Alexander Rodgers' Exhibit 2" is the lease under which I occupied these premises. The endorsement on the back of that, dated November 28, 1899, was made on that date, but there is another one that I do not see later than that. The
354 paper handed me is my own copy of the original lease.

(Objected to as immaterial and irrelevant; overruled.)

The lease referred to introduced in evidence as follows:

A. RODGERS EXHIBIT "2."

Lease, dated January 10, 1899. Milo S. Hascall to Alexander Rodgers; demises the premises in the City of Chicago, County of

Cook, and State of Illinois, known and described as follows: The south half of the basement (lessor reserving right for room for small steam plant for use of other tenants, if necessary), and the north half of the south half of the second, third, fourth, fifth and sixth floors of the building located at 220-230 Johnson street. Also right of way to south elevator (to be used jointly with other tenants of the building) (and paid for in proportion of the use of each) from the railroad platform by way of the east door on platform and by way of entrance on alley, and right of way to have his employes go upon the elevator by said doors and stairway, and right to ship in and out by wagons by the front door by chute and by the rear entrance as above described. All shipments in and out by front wagon entrance to be by way of the chute from the window on second floor.

To be occupied for seed business to have and to hold from 10th day of January, 1899, to 30th day of April, 1902. Said Rodgers to pay as rent for said demised premises $7,900, payable in monthly installments of $200 each, excepting the month of January, 1899, which shall be $100.

(Signed) MILO S. HASCALL. [SEAL.]
ALEXANDER RODGERS. [SEAL.]

Endorsed on the above lease, is the following:

CHICAGO, November 28th, 1899.

Milo S. Hascall hereby leases to Alexander Rodgers the south one-fourth of the top floor and the south one-fourth of the floor next below it of the warehouse described in this lease for $50 per month in addition to the amount Rodgers is already paying, making the sum of $250 per month from December 1, 1899, to the 30th day of April, 1902; said space to be used for storing seeds and for no other purpose.

Witness our hands the date above written.

(Signed) MILO S. HASCALL.
ALEXANDER RODGERS.

356 WITNESS (resuming): I had a letter from Hascall subsequent to November 28, 1899, and about May, 1900, letting me have the south quarter of the second floor. Mr. Wilson must have the letter. The building was originally occupied entirely by the General Electric. They concluded that they did not require the whole building, so they moved their property over into the north half of it, and put up wooden partitions from the top floor to the basement, and this lease called for all south of that wooden partition in the basement. In other words, the south half of the entire building. So in my original lease I got the whole of that basement, and only the north half of the south half, that would be a

lex- ers, 357 quarter, of the whole floor. After that lease was executed I used the part that I rented for handling seed, cleaning and taking care of stock, and as my business increased I got a lease for other portions of the floor. After a while I took all of the sixth floor and all of the fifth floor, and then later took all of the second. That is all in the south half of the building. I didn't use the top floor for anything but bringing in stock that needed rehandling, that is, that needed to be cleaned. It had to be cleaned before it was sent out again. The fifth floor we used for storage, and 358 the fourth and the third, and also the basement. We used the top floor for dumping; that is, a pile would be around in different places, as they came in, different grades piled by themselves, and when we wanted to clean them we took them toward the east end of the floor, and we had holes cut in the floor and dumped the seed out of the bags into bins that would hold about a carload. It passed from those bins on to the fourth floor, where our machines were set, which it passed over and cleaned, and went from those machines into bins on the third floor, and we sacked it on the second and shipped from the second. We did not sack on the third floor, there were no bins there; sacked no place except on the second. Our spouts came down from the bins to the second, and there they were sacked and sewed and marked and shipped or stored, as the case might be. We did not handle any goods except what was sacked. As the goods would come to us they were not always in sacks, sometimes they came in bulk, but they were always sacked by us before we shipped, though sometimes we shipped in bulk and it was dumped from the sack on the second floor through the spout that we had going down into 359 the car; but that was only occasionally, most of our product was shipped in sacks. We used the basement for receiving and storage; received everything into the basement, and everything was weighed there, then taken up to the sixth floor. No one used the first floor. It was vacant. I used it a little while last summer by permission of Mr. Hascall, but that is not covered by my lease. He just let me crowd somebody else out that was in there. The General Electric were using it and they wanted to get them out and they said, "You take and fill it up." I used those premises all the time in the way I have described, ever since I have been there. Have used the premises since August 31, 1900, in just the 360 same way. There has been no change whatever in the way I handled it. I used the premises just the same all the time since I have had them. I knew the National Storage Com- 361 pany before I executed this lease with them. I talked with Mr. Newbert about my entering into that agreement, as representing the National Storage Company. My way of doing busi-

ness with the National Storage Company was just the same
362 as in this case of the car of buckwheat. I would put the goods in store, would telephone my application, then go and get the warrant. That was not always done the same time of day before banking hours in the morning, sometimes it was done in the evening or in the afternoon. I would have this application made, but I would not make it. Sometimes I would telephone, and sometimes Vaas, the book-keeper, would telephone, for the warrant. I would tell them I wanted to get warrants on certain lots of seed, so
363 many bags, such a weight, located in such a section number, on a certain floor, and then they would go down and get them, and I would sign this application at the time that I telephoned. I had the blank applications, that yellow sheet there is it, and then after I had telephoned them I would fill out the blank application and sign it, and I think they came down for it when they made the examination, but I don't know that part of it. We got most of the warrants in the forenoon before clearing. I always tried
364 to get my deposit in at least fifteen minutes before 11. The method for getting the goods released was not always the same. For instance, if the bank held one of the warrants, and I wanted it, if I did not have the money to my own credit in the bank I took them up a trust receipt and they gave me the warrants that I wanted. I would then take it up to the National Storage Company and leave it in there, and they would send their inspector down to the warehouse with a removal permit. That would be sometimes before and sometimes after the goods had been shipped out on the railroad.

Q. State whether or not there was anything which would prevent the so-called inspector of the National Storage Company from ascertaining if the goods went out, both before and after they were released.

(Objected to; overruled.)

A. No, sir.

365 WITNESS (continuing): I have seen Mr. Rand out there at my warehouse. He came at all hours, sometimes in the morning, sometimes in the afternoon, I would see him. Of course, I left there usually about 10 o'clock and did not get back until 2. I frequently obtained the receipt before the inspector signed his name upon the application slip, and before he had been out there. Oh, no, the warehouse receipts would not be delivered to me before the application was delivered, but before the inspector would be out to examine it. In other words, the National Storage Company took my word for the statement that there were certain bags of seed in a certain portion of the warehouse, then the inspector would

Alexander Rodgers,

366 go around any time and verify it, and I would get those warrants before any tags would be put upon the bags. I had a little white tag that my people put on the bags. It was just to tell us how many pounds was in that carload of bags. We usually put them up in carloads. There was not a tag on every bag, just a little white one, about two inches by an inch and a quarter or an inch and a half, just so we knew what was in that lot, but no figures on it. There may be some writing stating what was in the car, such as buckwheat or timothy. That was our private tag; it did

367 not have our name on it, just the weight and number of bags and what the contents were, and not necessarily the quality of the contents. It might be Hungarian, millet, timothy, or something like that. We never put a tag on the National warehouse goods; that is, I never did and I don't think our employes did.

Q. State whether there were any formalities gone through with between yourself and the National Storage Company as to the use or possession of these premises, after or at the time of the execution of the agreement on August 31, 1900, as to the delivery of the key, or anything like that?

(Objected to as immaterial; overruled.)

A. There was no formality other than that lease. I think that when I took those other floors it is possible that there was

368 something added to this. Now, I have not looked at it to see whether this lease covers all the basement. Yes, that is this one; that is all right.

WITNESS (continuing): I never saw any of these little blue tin signs that they have referred to in the building. If I did I don't know it. I have seen signs of theirs indicating that they had possession of part of those premises; saw a large paper card that, guessing at the size, was probably 12x6 inches. Cannot say. I think about the width of that card up there (indicating calendar on the wall); I think it is as long as that and about that width. That would be, I should say, about 16 to 18 inches long and 16 inches wide.

369 There was one of these cards on one of the bins up there. There may be others. There may be one on each floor; I cannot say whether there is or not. I don't remember, personally, ever seeing more than one, the one on the bin; there may be more, but I don't remember. Cannot say that when they took this lease they came up there and put that card up. So far as I know that was the only one that was put up. That was on the fifth floor. Have not looked recently to see whether there were any up there now or not. I presume there were at the time of the failure. Did not look at that time to find out. Have not any positive knowledge as

to whether the card is there now or not, but I presume it is
370 there; it was tacked up there. I cannot tell you the contents of the card; it was something about the National Storage Company having leased those premises, but I cannot tell you what was on it. It was made of paper or pasteboard. It was not a tin card. I don't know where it was that I signed this lease, whether I was in their office or they in mine.

With reference to the substitution of grain which was covered by warrants issued by the National Storage Company, I did that frequently. As I said here a while ago, if I had inquiries for samples, I would go to my box and take out samples and submit them to prospective buyers. If they selected a car that was in the National Storage, I did not hesitate to take that car out and take one of my own and put in its place, assuming that it was all right as long as there was the same number of bags and the same
371 quality, or better seed, as what I had taken out. I had a conversation with Rand at the warehouse with reference to that method of making the substitution. I said one day, "Sometimes seed is rushing in here and I don't have time to clean it, and am obliged to put it somewhere and get warrants for it, so I can pay for it, and I don't wait to clean it so just put it in store. Is it all right if I, when I get around to it, want to take that seed out and clean it and put it back again?" and he said, "Why, this is all right; all we care about is that you keep that warrant protected with a like amount." That is the only conversation I ever had with him, and assuming that as long as there was seed
372 in there to cover their warrants I had no hesitancy in taking the seed out. In substituting those bags the tag which was on the pile would be placed right back on that pile as soon as it was put into position. I did not take it off, did not do anything except order it done. I never saw any substitution; I gave the orders to my foreman. T. A. Black has been my foreman since the last of September, or October. The substitution to which I refer where I had a conversation with Rand was, that having certificates out on seed that had not been properly cleaned, I considered that it was proper to substitute cleaned seed for uncleaned seed. We put more valuable seed in the bags on which certificates were out because we could not ship out a car that ran irregular. This
373 stuff that we sold required to be cleaned, and had to be every bag alike. I said that it was the same seed; that I had a right to clean it and put it back again, and not put in other seed. Sometimes I would have to add seed to it. The conversation with Rand was that I could take and clean that very seed and put it back into the bags; that was the only conversation. The cleaning of the seed would reduce it in bulk, and then we would fill it up

Alexgers,

with other seed to make up the diminished bulk and weight.
374 I have moved a certain number of bags and replaced them with a certain other number of bags of like character and quantity, from the piles on which warrants had been issued.
375 One of my employes placed the signs, with the word "Div." for division, and "Sec." for section, and the numbers on those signs, in my premises, under my direction. They were placed there, I think, after my leasing of the premises, about January, 1899, probably along in February. I think in the south-west
376 quarter of the fifth floor there were additional signs of that kind put up after I entered into that agreement with the National Storage Company. It was not in our original lease. There were no other signs put up after that that I know of.

Examination by Mr. Mullen.

I did not cause any sign to be placed on the second floor marked with the sections on that floor. There were never any signs on the second designating sections and divisions.

Examination by Mr. McNab.

I used each different floor of those premises for my own goods as well as the goods of the National Storage Company. Had no general division where I kept my own and others. I put them in place where I happened to have room. Have put buckwheat in storage down there in the National Storage Company. Buckwheat is grain. I don't think I ever put any barley or any wheat in
377 storage. My employes had free access to any part of the house that they wanted to go. I never asked permission of the Storage Company to allow my employes to go through that place.

Cross-Examination by Mr. Peckham.

I said just now that there never were any signs on the second floor indicating the divisions or sections. There was a Division E and Section 9 on the second floor, but there were no signs on it. We knew where it was. It was just outside the office, 7½x20 feet. There was a little gangway between the office and
378 the section. If you had taken receipt numbered 9426 of the National Storage Company, marked "Exhibit R, Hoge," from the First National Bank, and gone up there and presented it, I would have taken it for that property, and could have taken you to Division E in Section 9. Anybody in my employment could

have done that. I merely mean that there were no signs up; just that small space outside the office on the second floor that we divided up and knew without putting the signs on it. I don't know whether we used any odd numbers on that floor or not. Whether we used 2 or the multiple of 2, or whether it was 2, 3, and
379 up, that way. There was no Division B on that floor. There was a Division E. I don't know whether there was a Section 10 or a Section 8. Mr. Black could tell you better than I; I think there was an 8. I know that there was a Section 9 right outside the office. It might have been further along. Division E, Section 9, would be further along on the second floor; it would not be this space right outside the office. The first one outside the door was it; whether it was 1 or 2, I don't know which, I think the first one was 1 and then the next 2. I don't know how we could find it out if you presented these receipts. I know we could do it. I
380 know if you brought this warehouse receipt to me and told me that you wanted to see that particular property that I coud take you to it. I could do it because there would be a tag on the end of the pile. That tag would say "Div. E, Sec. 9." That is the way I would find it on that floor. I simply mean that on that floor there were no overhead signs. In other words, the only sign on that floor was the sign on the bags, the tags themselves. On the front cross-row of the piles in any particular section there was a tag which told me what section and division the bags were in. We knew that seven feet from the gangway was Section 1. We could
381 tell without the tag; I presume if the tag had been off there they could have told by counting the piles. We knew where Section 1 began. I think it was right outside the office door, but I am not certain about it. Think I could tell if I were at the office by going out and looking it up. Of course when I did not look at the tag I could not tell whether I commenced there or 9, I would have to look at the tag. I could tell if the wrong tag was on the bin, or the tag was on the wrong pile. If they had taken a tag from Section 9 and put it on Section 1 or 4 I would know the differ-
382 ence. Am not certain now whether that first pile was Section 1 or not. I could have identified the property if you presented this receipt to me; I could have gone to the pile and given you that pile of seed by the tags. The tags would have been a help. That would not be the only way. It is just this: You know where to go to take one of these bags from that receipt without counting. If any stranger had gone up there he would not have been able
384 to have found any particular section on the second floor. He would be able to find out any particular section by asking certain of my employes. There were others there like myself that knew that. I presume a stranger going there would know by examining

the tags, but he would not know whether that tag was moved from
Section 3 or not when the employe would. I would not have
385 to pace it to find the location of Section 9, supposing there
were not bags or tags there at all. I knew it. If you gave
me this receipt which reads, "Div. E, Sec. 9, second floor," I could
walk right to it without stopping to count up from one end. I
could do this with any section on the second floor without stopping;
am so familiar with the premises that I know where it is, and don't
need any signs, so far as I am concerned, on the second floor, be-
cause that is not used so much as the other floors.

Cross-Examination by Mr. Elsdon.

That is my signature attached to Exhibit A. I stated this
morning that the only contract I had with the company outside of
the warrants was the lease. I was mistaken in that. There
387 was a lease, and this is the contract (referring to contract for
warehousing, marked "Exhibit A"). The property in the
388 building Nos. 220 to 230, both inclusive, Johnson street, in-
cludes not only my portion of that building, but also the por-
tion rented by the Electric Company. In other words, when it
says "the south half of the basement part of the premises No. 220 to
230, inclusive," it means the entire basement up to the partition be-
tween us and the Electric Company. We rented the entire base-
ment up to the partition. No one has had possession of the first
floor of that property up to the partition, that is, the south half of
the entire building, since I have been there. As to the second floor,
my lease in evidence originally covered the north half of the south
half, that is, the north half next to the partition. No one has
389 had possession of the south half of that property while I have
been there. No one has been in there but myself; that is, no
other party has been in possession. I have had the north half of the
third floor all the time, that is, the north half of the south half.
The north half of the south half is included in this lease from Has-
kell. No one but myself has been in possession of the south half
of the south half of that floor. The fourth floor has been the
390 same way; no third person has been in possession of the other
portion not included in my lease. No one has had possession
of the portion of the fourth floor included in my lease. I have also
had the south half of the fifth and sixth floors since November 28,
1899, I think. There are six floors to the building. Before this
additional agreement of November 28, 1899, was made there had
been no one in possession of the balance of that floor not included
in my lease originally. It is just the same with the sixth floor as
with the fifth. The National Storage Company, when I made

391 this lease with them, began storing goods there right away as soon as the lease was made. The Storage Company issued their first warehouse receipt immediately after the lease was made. We clean the grain on the fourth floor. The National Storage Company have at present property stored on that floor, I presume; am sure of that; cannot tell you where their property is. The machinery for cleaning grain is situated near the east end of the north half of the fourth floor on the north side of the elevator, twenty feet, I guess, north of the elevator to the beginning, perhaps not quite so far. Am sure that it is entirely on the north half. There are two fanning mills or steamers and one chest of reels con-
392 stituting this machinery on the fourth floor. There are no spouts running from the fourth floor down to the other floors through which the grain is poured. The seed drops from a bin on the third floor; it goes through spouts from the bin down to the second floor. It goes from the fourth into bins on the third, and then there are spouts in those bins on the third floor to the second. The elevator on those premises is located at the south half of the premises. The staircase is on the south half. In our business we use both the staircase and the elevator. Those portions of the
393 floors that are not included in my original lease, and which I do not rent, I use with the consent of Mr. Haskell for piling surplus stock. Have been so using them a little bit all the time since I have been there. Do not think I have so used them since the first day of the year; if we have I don't know it. When we are crowded for room I just shove it over there temporarily. Haskell didn't use them at all. I think I was using them in that way at the time that I made the lease to the National Storage Com-
394 pany. I stacked the seed on the north half of the second floor. When I say, as I did on direct examination, that I used the premises there the same since I made the lease to the National Storage Company as I did before, I don't know that I can answer any different from what I have. I used the floors. I rented them, and I used them. I don't mean to say that the Storage Company did not have any grain. They used those sections and issued
395 warehouse receipts on the goods stored in the different sections. By using the sections and issuing warehouse receipts by the Storage Company I mean I used them just the same all the time, from the time I got them until this thing occurred; there was not any difference that I know. The company had issued warehouse receipts on those goods in those different sections, and when I say I used them I mean with reference to the fact that those goods were in there on which the warehouse receipt had been issued. I
397 mean to say I moved the stuff out from a section that was covered by a warehouse receipt to put my own property in

there, that was not covered by a warehouse receipt. I don't mean to say that all the property I put in there in those different bins or sections was changed by me while the receipts were outstanding on them. Those that were not changed I did not interfere with, so that to that extent I did use the premises the same after this lease was made as I did before it was made. I used them the same all the time. When I say that I used them all the same all the time,

I think I mean that if I wanted a warehouse receipt and there
398 was not any goods in that space I put stuff there and asked for a warehouse receipt. If I had a space there that I wanted to pile up a car of my own seed and issue my own warehouse receipt of it, I would do it when it was vacant.

WITNESS (continuing): I took out seed on which warehouse receipts were issued without cancelling or having the receipts returned, and substituted other seed for it. It was not merely that I occasionally took seed and cleaned it and put it back, but I also took out seed on which warehouse receipts were out, and without changing those receipts took that seed and carried it away and brought back other seed in place of it without saying anything to

the storage people about it. I don't know whether they knew
399 that. I don't know how often I did that, my storage book will
show. I never saw it done myself; I would tell them they
400 could do it and they would do it, and in that way I know it was done. I am simply assuming that it was done because I gave orders to do it.

Q. You have spoken of trust receipts on your direct examination that you gave to the bank. What do you mean by that?

REFEREE: Mr. Peckham, state what they were.

Mr. PECKHAM (for the Bank): We have two forms, and I will bring them up.

(Objected to; sustained.)

402 WITNESS (continuing): I said that I never saw any tin signs of the National Storage Company on those different floors. Would not pretend to say there were no such signs. I cannot state any one instance in which releases were issued after the goods were shipped out. I know of my own knowledge that that

was done; know the goods have gone out and I have collected
403 pay for them. If I would start on the B. & O. and order the cars in the night before, which I frequently did, I would take the receipt from the B. & O. Railroad Company and bring it down to their office on Adams street here and exchange it for the bill of lading and attach that bill of lading to my own draft and take it to the bank, and make one trip for it. They would go upstairs and ask for a release. I don't know that I remember any particular

instance where the release was issued after I had obtained the bill of lading and attached the railroad receipt to it. I could not say that any of the property now in the warehouse and covered by the warehouse receipts is grain that has been substituted for other
404 seed. I do not know of my own knowledge of any grain covered by warehouse receipts now outstanding that has been shipped away and other grain substituted for it. I could not state a single instance of my own knowledge where any warrant was issued upon property by the National Storage Company before an examination of the property was made by the inspector of the company. Cannot give you the date of the conversation with Mr. Rand; it was along last fall some time; that is, the fall of 1900, but I cannot tell you when. I presume it was along in our
405 busy season in September. No one was present at that time. The conversation took place down in the warehouse, I suppose, right out on the second floor. It is not a fact that at that time when I asked that question of Mr. Rand that he said in reply that I must make no such changes as that; that if I wanted to move any of that grain for the purpose of cleaning it I must first have the warrants canceled and new ones taken out on other property in the warehouse, and that when it was cleaned if it was put back again I must have new warrants issued on it after it was cleaned. I am positive no such conversation as that occurred. Did not store
406 grain there in bulk. Do not know whether I am classed in "Class C" or not. I stored grain or seed in bags there, but not grain in bulk, and issued receipts for it.

Re-direct Examination by Mr. Eschenburg.

I did not see that car of buckwheat for which a receipt was issued on the 7th go out. That morning I telephoned to the company that I desired a warehouse receipt. The buckwheat had
407 been shipped on the 6th. I have the railroad bill of lading for the car after it was shipped. That was the first car of buckwheat. The second car of buckwheat I received the warehouse receipt for between ten and eleven o'clock on Saturday, May 7th. It had not been inspected at that time. No, I don't know that that had not been inspected. I did not see him inspect it. The first thing I knew about it was when I telephoned in the morning of the 7th that I wanted a warehouse receipt; then I went down and got the receipt.

Mr. ELSDON: If the court please, I want to ask whether it is proper for counsel on that side to cross-examine this witness.

The REFEREE: No, I do not think that each one of these
408 gentlemen has a right to cross-examine.
409 WITNESS (continuing): When I say that I did not of my own knowledge know that there had been a substitution of grain or seed in cases where warehouse receipts had been issued, I mean that I did not do the work personally, but directed it to be done. I afterwards received a bill of lading from the railroad company purporting to be for the same seed. It took six or eight men to change the seed. The foreman, Mr. Black, had charge of that part of the work. The storage book now shown me is the one I mentioned. That was kept to tell that I had received from the National Storage Company the receipt for 250 bags of timothy, that it weighed so much, and where it was located, and who held that; it would also show what became of it afterwards. I can
411 tell from that book whether any substitutions had been made. Mr. Vaas kept it.

(Book marked for identification "A. Rodgers 3.")

Examination by Mr. Wyeth.

I spoke of a railroad receipt and of taking it down to the First National Bank, and sometimes exchanging it for a bill of lading with the railroad company to go to the bank. That would be in case of shipment of a carload or more of grain away by the railroad to some purchaser from me, and there were cases of such sales in which I would go in with the draft and receipt from the railroad, or bill of lading, to the bank, where the bank held a warrant of the National Storage Company upon the lot. There were cases of that kind. I would give the bank a check for it after I made my deposit, in taking up the storage warrant held by the bank. In those cases I would take my draft on the purchaser and bill of lading to
412 some representative of the bank first; I took it to Mr. Thomas first. He charged up the exchange on the draft, then I would take it down to the window and deposit it to my account. It would have the bill of lading still with it. Then I would go back to Mr. Blossom and hand him a check, with a request for warrant of the car that I had shipped out, and he would give me the warrant; then I would take that warrant upstairs and ask for a release of the
413 National Storage Company. The trust receipt would be used sometimes; when I did not have anything to replace that with, or perhaps to cut down my bills payable account when I did not care to replace it, then I would give them a trust receipt and they would give me the warrant. Then I would take it upstairs and have it canceled or get a removal permit, and then take out the stuff, and next day deposit it and at the same time give a check to the

bank for the warrant and take up that trust receipt. I didn't bother about any balance being put in my account, as long as I knew I had enough in there to take care of the check. It was not frequently the case that I got the release myself down at the office of the National Storage Company.

Cross-Examination by Mr. Peckham.

I used one method in doing business with the bank about as much as the other, but whenever I had sold a carload to go out of town I adopted the former method, and when I wanted to re-
414 duce my account in the bank I adopted the latter method. Sometimes this way would reduce the account just the same, but usually the object of a trust receipt might be that I would want to manipulate that car and could not get it out so promptly. I would have to mix that with something; but in that case I would have a bill of lading immediately to take up the trust receipt.

Cross-Examination by Mr. Elsdon.

These railroad receipts were never issued at any time before the goods were actually shipped. I never got a receipt from the railroad company until I delivered the goods.

Examination by Mr. McNab.

415 When I moved goods into the warehouse there on my own account, my own goods, I placed them wherever I had room.

Q. Is it not a fact that your goods were often in the same section of the National Storage Company?

(Objected to by Mr. Elsdon as leading.)

The REFEREE: I think I will have to give them broader privileges than I started out to.

(Objection overruled.)

A. What do you mean by my goods?

Q. I mean the goods that you moved in the warehouse, the goods that you purchased to sell or were stored in there on your own account.

416 A. You mean in the same sections where the National Storage Company had theirs.

Q. Where there had been goods of the National Storage Company.

A. There could not be, not if I understand your question right; it would not be possible.

WITNESS (continuing): I was around in the warehouse there more or less every day.

Q. Did you ever see any of those blue signs up there that they brought up here, those little blue signs?

(Objected to; overruled.)

A. No.

WITNESS (continuing): I spoke about storing certain grain on the third and fourth floors on that part of the premises that were not covered by my lease when I was crowded for room. There was none of the grain owned by the National Storage Company stored in that part. I don't know whether there were any goods
in the basement of the building belonging to me personally on
417 the day of the failure.

W. W. WILSON, recalled on behalf of the receiver, examined by Mr. Wyeth, testified as follows:

I am one of the attorneys for the Chicago Title & Trust Company, receiver in this case. I have charge of most of the trust matters, and have special charge of this receivership for the company. Have had such charge since the receiver was appointed. I know Mr. Bard, who was the custodian then of the receiver. I gave him directions with regard to letting in any representatives of
the Storage Company to Rodgers' place of business on John-
418 son street. Before I thus gave instructions to the custodian I had a conversation with Mr. Wallace Heckman, representing the National Storage Company. He came over to our office, and, if I remember, he said that he was the attorney for, or connected with the National Storage Company in some manner, and told me that his company had certain goods on the premises down there and wanted to know if I would not give him a letter to give to my custodian allowing them the privilege of having a man on the premises to watch their goods, something like that, I don't remember the conversation that we had. It was quite a lengthy one, we were talking there twenty minutes, about. This Wallace Heckman is the gentleman who appears in the case now. He said that the goods belonged to the National Storage Company, as I remember. As I
remember it, he said that the goods were there under lock and
419 key and seal of the National Storage Company. Pursuant to that talk I dictated a letter to Mr. Bard and had it written. The letter shown me, marked "Exhibit 110," is the letter. I don't

remember whether I gave it to Mr. Heckman that day or not. It is dated May 9th. I could not tell whether that was the day I had the conversation. This is the only one that I delivered on that subject. I gave it to some one representing the National Storage Company; that is, I gave it to them for this particular purpose,
420 so that they could have a man there. I had more than one conversation, I think, with Mr. Heckman. I don't know whether there was any one else there; I believe Mr. Elsdon was there at one time, am not sure, there have been so many talking to me about this case. I cannot tell exactly whether it was before or after this letter was delivered. At that time I had not been down to the warehouse to see the stuff. Knew nothing whatever about the condition of affairs there at that time. Following the writing of the letter, as I remember, I telephoned Mr. Bard immediately, or very soon, a day or two, anyway, I should judge, after the letter was written. It was Bard that telephoned from the warehouse. I do not know whether it was at a time when the parties were
421 there, or represented to be there. My telephonic directions to Bard were to allow them admission. There was a great deal going on; he would call me up maybe eight or ten times a day about some matter that would occur down there. No, I cannot tell exactly when, or the day that I talked to him over the telephone about allowing the people of the National Storage Company in there. He called up, very likely, soon after I wrote the letter, but I cannot place distinctly the incident or the date. The instruction given to Bard by telephone was substantially like the letter. I gave that instruction to Bard solely on the information that I have detailed; that I received from Mr. Heckman, or from him and
422 Mr. Elsdon, the parties representing the Storage Company, as I have testified. I knew nothing about the condition of the failure at that time to speak of. It was very soon after we were appointed, and I had not looked into the merits of any particular claim.

Cross-Examination by Mr. Heckman.

I cannot remember all of Mr. Heckman's conversation, but I know that he claimed at the time that the property was the National Storage Company's, and so far as the language that he used, or whether he used the word "title" or not, I do not know. My remembrance is that he said that this property belonged to the National Storage Company. I understood so. I guess it is more like it to say that it was clearly understood between us that it was property that the National Storage Company was storing and issuing warrants for. I had all the property insured that was there
423 at that time. I instructed our agent to place insurance on it.

I think I had this property of the National Storage Company insured at that time. I put $30,000 or more insurance on the property down there, which I understood covered all the property on the premises. Now, whether that is part on the property of the National Storage Company or part on the property of Alexander Rodgers or not, I do not know, but I tried to cover all the property that was there, because at the time I didn't know anything about the title of the property, that is, I didn't know of any particular claims. The very day I got the notice, or a short time after I was appointed receiver, I had insurance put on the property. I do not know that I said in the conversation referred to that I had not had this property insured. Could state better if I had the insurance policy. The first time I heard of the National Storage Company's property and interest there, or interest in the property, was the day I
424 was appointed receiver. There was something said, I don't know whether it was when I was walking down here from the court house or after I had gotten back, but the day I was appointed receiver something was said to me about the claims of the National Storage Company. I don't remember what the conversation was; don't know whether it was Mr. Wyeth or Mr. Martin who told me that. Mr. Martin is the gentleman sitting back there. He is attorney for Mr. Rodgers, the bankrupt. I know it was one or the other of them who mentioned it around about the time I was appointed that day, and very near the same time. I presume in the conversation with Wallace Heckman on the day I alluded to, when the matter was first mentioned, I said in substance that I knew
425 about the National Storage Company. Don't know whether I had the conversation with Mr. Heckman on the day I was appointed receiver or the next day. I said in substance to Heckman on that day that I knew about the National Storage Company property. I didn't exactly say in substance to him that I made no claim to the National Storage Company property. I cannot tell the conversation. I don't know whether I said I
426 didn't make any claim to the property tagged with the tag of the National Storage Company or not. I don't know whether I was that broad in my statement or not; would not like to say as long as I don't remember of having said it. I don't remember of having made it as broad as that.

I don't remember much about this conversation about insurance, only that I put insurance on enough to cover all the property in our possession.

Mr. HECKMAN: I would like to have that stricken out as not responsive to the question.

(Answer stricken out.)

WITNESS (continuing): I believe Mr. Heckman said the
427 Storage Company had insurance on some property down there. There is very little I remember about the insurance question.

Examination by Mr. McNab.

Mr. Heckman said the National Storage Company had the keys.

Cross-Examination by Mr. Heckman.

Here is what I remember of that conversation about the lock and key. Mr. Heckman came to me and asked me to allow him the privilege of having a man down there with this property. I at first didn't know whether to do it or not, and he went on in that conversation and told me that this property which the National Storage Company claimed, or had a lien on, or had issued warehouse receipts for, was under lock, key and seal. I remember dis-
428 tinctly the word seal.

Q. Let me ask you about that. When that conversation occurred was not it in connection with this, that I (Heckman) undertook to explain to you our method of doing this grain and storage business; not that that particular property was so, but that our way of doing was to rent a room, or part of space, and that that question of the seal and lock came in the conversation, and not as to this particular property?

A. It may have been that way, but I was led to believe, or, rather, I did believe, that this was the same way.

WITNESS (continuing): I do not recall anything additional
429 in reference to the conversation by looking at the letter.

(The letter introduced in evidence, marked "Exhibit 110.")

The letter is as follows:

CHICAGO, May 9, 1901.

George R. Bard, Custodian,
Chicago, Illinois.

DEAR SIR: Kindly allow a representative of the National Storage Company admission to premises of Alexander Rodgers, 220-230 Johnson street, Chicago, Illinois, as they have a great deal of property in storage in that building, and their man is desirous of watching and looking after it.

Act in unison with him. Your interests are entirely separate. The National Storage Company's property is distinct from that of Mr. Rodgers'. Their representative will undoubtedly explain all to you.

Yours truly,
CHICAGO TITLE & TRUST COMPANY,
By WM. D. WILSON.

JUNE 4, 1901.

THOMAS A. BLACK, called on behalf of the receiver, examined by Mr. Wyeth, testified as follows:

430 Live at 342 Winchester avenue, Chicago. Have been in the seed business for about eighteen months for Alexander Rodgers, in his employ; since the middle of December, 1899. Up to September or October, 1900, I was clerk in the office; since 431 then acting as foreman. Was overseer of the men; oversaw the general handling of the seed. Passed about ten hours each day during the week days at the warehouse. Was out of the building about half an hour each day at noon for lunch. Am acquainted with the method of piling and storing grain in Rodgers' warehouse. Have noticed while there the signs in and about the various places in the warehouse. Have noticed signs of the National Storage Company, a blue tin sign, about 4x6 inches. I know of six of those signs to have been there since last summer; two on the fifth 432 floor, one on the fourth, two on the third, and one that I know of in the basement. There might be more in the basement. Those signs are there now. There have been no other kind of tin sign of the National Storage Company there since last August except in the basement. On the third floor there is one of these tin signs on the wooden partition that separates the two halves of the building, and I am not sure whether it is on that floor or on the fifth that there is one on the bin that contains the seed used in cleaning seed. On the fourth floor it is on the same wooden partition. On the fifth floor there is one, and there is a case there with holes for a sprinkler system with a sign on it. Don't know whether it is on the fifth or on the third that that sign is on. There is none on the sixth. Would say the signs are about seven feet from the floor. The piles of seed are ordinarily six or seven feet high. I don't think a person standing in the aisle in front of a pile of these bags could see the tin sign. The bags would prevent its being seen. That is, the bags are piled high enough, at least in many cases, so that the sign could not be plainly seen. There was a pasteboard sign up there in the building 10x16 inches in size spoken of yesterday by Mr. Rodgers, but I could not say whether it belonged to the National Storage Company or the company that was in there before that. That was on the bin that was on the fifth floor, 434 used for cleaning. Could not give the exact wording of the sign. It is to the effect that this property was leased by the Storage Company, and known as warehouse No. . . , some number. I think on the paper sign the Storage Company name was the Mer-

chants & Manufacturers Warehouse. That sign is not there now. Could not say how long it has been since it was there. I don't think it was there at the time of Rodgers' failure. Don't remember seeing any other sign like it on the building.

I carried on my work as foreman principally on the second and sixth floors. There are no other signs on the second floor of any kind, to my knowledge. There were no signs of any divisions or sections on the 8th of May and prior thereto on the second
435 floor, and no other signs there.

I know Mr. Bard, who was custodian for the receiver. Remember seeing him down there on May 8th about 12:30 o'clock, in the office. I had been out to lunch and came in, and he was there, and Vaas introduced me to him. He asked me to make a tour of the building, which I did. Vaas stated who he was in introducing him to me; stated that he was the custodian. Did not state who he was custodian for. I didn't know at that time who he represented.

We visited each floor, that is all we did. Could not say which
436 floor we first went to. Went to all the floors and the basement.

Just looked over the floors. Walked together on the floor; just walked around the floors. After we had gone through the floors we went back to the office. That was all that was done or happened on our trip that I remember.

It was part of my work while with Rodgers as foreman to attend to the storing and the weighing out and piling of this seed. When a carload of seed was brought in there to be piled up in storage I would locate a vacant place and have it put there. When it was piled up it was cleaned and bagged. I have noticed those
437 pasteboard tags of the National Storage Company that were placed on certain piles in the warehouse. Mr. Rand generally placed those tags on the piles there while I was foreman. The tags were kept in the office before they were used. I never in any instance placed the National Storage tags on original lots. I mean by original lots, the first time that a lot comes into the place. When the order would come to me from Rodgers' office to ship out any of those piles that had on them the tag of the National Storage
438 Company, I would go to the car and ship it. It would be taken from a pile and transferred to the car. In case there was a National Storage tag on the lot I would take the tag off, and when Vaas was there give it to him. I could not state any particular instance where the tag was taken off by me. There were cases where this was done. When it was taken off I would keep the tag on my person or in the desk. In case the pile was not replaced at the time I would either tear it up or turn it in to the bookkeeper. It is a fact that I tore up some of those tags in such cases. In cases where a pile having an actual storage tag thereon was thus

shipped away and the pile was replaced by another lot, I would put the original tag right on that pile.

439 I generally weighed the car that was replacing a previous one. The memoranda or slips that I made out I would turn in to the book-keeper. I generally made out a memorandum when I weighed or oversaw the weighing of a car that came in and was put in storage. The paper handed me is one of those memoranda made by me. I recall that because of weighing in that grain. I remember where that lot was placed. It was placed on the

440 third floor, Section 10, Division D. It was 250 bags of Hungarian seed, and was weighed in April 19, 1901. After I had completed the transaction the memorandum was handed entire to the book-keeper Vaas. He made the entries in the storage

441 book. The letters and figures 3, D, 10, in the lower left-hand corner, were placed there by me to show the location of the seed in the warehouse. D indicates the division and 10 the section, and that was placed there before this memorandum was handed to the book-keeper. That corresponds with the division and section that is marked in the building where that lot of Hungarian seed was placed. The figures up at the left-hand corner, "4-19-01," were placed there by me. That indicates the date of the transaction.

442 The long letters and figures there are a detailed register of the car, and shows the total net weight. In that case it was 36,719 pounds.

Paper introduced in evidence, marked "Black Exhibit 1."

(Objected to; overruled.)

Paper is as follows:

BLACK EXHIBIT 1.

Date 4/19/01 Storage.
From, stock.
Car No. H 31. Bags, 250. Kind, Hungarian.
T A B—weigher.

6	893	886	888
	859	889	876
	880	888	881
	887	874	902
	880	894	896
	857	893	888
	878	882	917
	875	889	905
	877	890	905
	878	919	890

	883	880	895
	887	909	876
	891	898	739
	879	899	729
84	12304	12490	12175
	84	82	
		84	12490
		84	12304
		250	36969
			250
			36719

3-D-10 Brand bags—A & A

WITNESS (continuing): After that pile was placed there in the room it was probably replaced later. Could not give the date. There was another ticket similar to the first one. Have seen before the ticket or slip marked "Storage" in pencil. It was made on
443 May 7th. It is Mr. Clemens' handwriting, one of the employes of Rodgers. I was present at a part of the replacement there that I speak of. Know of my own knowledge that the new lot of seed was put in D.10 on May 7th. I took no part in the weighing in that case, and would not know from that memorandum whether the weights on there are correct. That slip went through the regular course, was turned in to the book-keeper. Don't know that of my own knowledge any more than that the book-keeper's writ-
444 ing is on the back of it, and I know he has had it. I don't know of my own knowledge whether that was made on May 7th. I know the prior lot of seed in Division D, Section 10, was taken out, but I could not give any date. It was taken out before May 7th. I remember the fact of this memorandum, being present at the time that this lot was replaced—was put in. May 7th was the last day Rodgers carried on business there. I could not
445 say how long before May 7th the car was shipped out. It must be, of course, a very short time before. Could not say how many days. Don't know where the lot was shipped to. Could not say whether the original lot that I have testified to from that paper introduced in evidence was still there on May 1st.

(Paper marked "Black Exhibit 2" for identification.)

Q. Mr. Black, does your recollection as to the date of this storage slip dated May 7, 1901, being the date on which this new lot was weighed in and placed in Division D, Section 10—

446 (Objected to as leading; overruled.)

A. My best recollection is that that is the correct date.

WITNESS (continuing): I removed the tag on the other lot that was shipped out, and placed it on this lot, in Division D, Section 10. I did not place the same tag back. The slip handed me marked "Storage" at the head was made by me on February 12, 1901. That was a case of weighing in and putting a lot of 250 bags of timothy seed. It was placed on the fifth floor, Di-
447 vision B, Section 30; the weight was 31,892 pounds. All that memorandum was made by me; when I was through with it it was turned into the office. It is dated February 12th. I don't remember whether there was any tag of the National Storage Company placed on that lot.

The paper introduced in evidence, marked "Black Exhibit 3."

(Objected to as immaterial; overruled.)

Paper is as follows:

BLACK EXHIBIT 3.

2/12/01 Storage.
From Stock
Car No. R, circle, R K. Bags 250. Kind Timothy.
T A B—weigher.

32142
250

31892

Fl. 5, Div. B, Sec. 30, Brand Bags A & A, Naomi 19.

448 WITNESS (continuing): I made up the slip handed me; that was April 6, 1901. It is the car that replaced "Black Exhibit 3" just introduced in evidence. The replacement took place April 6, 1901. Could not say without looking at the book as to what became of the lot placed in there on February 12th. It was taken out of Division B, Section 30. This memorandum with these words and marks, "Div. B, Sec. 30," was made by me as a part of the memorandum. I gave it in the regular course to the bookkeeper. Don't remember anything about the National Storage tag on this particular lot, as to what was done with it. The weight shown here is 31,794 pounds.

The memorandum introduced in evidence marked "Black Exhibit 4."

(Objected to; overruled.)

449 Paper is as follows:

BLACK EXHIBIT 4.

Date—4/6/01 Storage.
From—stock.
Car No. R circle S S. Bags 250. Kind Timothy.
T A B—weigher.
32044
250
31794
Fl. 5, Div. B, Sec. 30, Replace, Brand bags, Naomi.

WITNESS (continuing): I made the storage slip now shown me. That was made to replace the same lot in Sec. B, 30, on April 13th; the weight is 29,341 pounds. The memoranda on there with regard to the division and section show where the replacing grain went. That grain put in Division B, Section 30, took the place of that which was there shown by "Black Exhibit 4," which I have just looked at.

Paper introduced in evidence as "Black Exhibit 5."

(Objected to; overruled.)

Paper is as follows:

BLACK EXHIBIT 5.

Date—4/13/01. Storage.
From—stock.
Car No. 32372. Bags 250. Kind Timothy.
T A B—weigher.
29591
250
29341
Replace
5 B 30 Brand bags Ams.

WITNESS (continuing): I made the storage slip now handed to me on May 7, 1901. That was to replace the previous grain referred to in this Black Exhibit 5. I made the memorandum
450 shown on that slip; it gives the weight of the lot as 31,242 pounds. That replacement went into Section B, 30, and took place at the date shown in the memorandum. When I was through

with it the memorandum went, in regular course, to the bookkeeper.

Paper introduced in evidence as "Black Exhibit 6."

(Objected to; overruled.)

arch Paper is as follows:

BLACK EXHIBIT 6.

Date—5/7/01. From—stock. Storage.
Mark—R, circle, RK. Bags 250 Kind Timothy.
W. C. T. A. B.—weigher.

31492
250

31242

Replace
5 B 30 Brand bags A & A

WITNESS (continuing): I could not say what was done in the matter of the tags that were on these identical lots in these various substitutions. It was the custom for me to take them off and 451 replace them, but I cannot say absolutely whether I did it in these particular cases. The storage slip handed me, dated March 29, 1901, was made by me. It bears my initials. This is a pile replacing a lot in this same Division B, Section 30. That was in March, prior to some of these other dates; the weight is 32,207 pounds.

Paper introduced in evidence marked "Black Exhibit 7."

(Objected to; overruled.)

arch Paper is as follows:

BLACK EXHIBIT 7.

Date—3/29/01. From—Stock. Car No. R, circle, S M. Storage.
Bags 250. Kind Timothy. T A B—weigher.

32457
250

32207

Replace
Fl. 5, Div. B, Sec. 30. Brand bags A & A

JUNE 6, 1901.

Examination of Mr. BLACK resumed:

Examined by Mr. Wyeth.

453 That went to the book-keeper. These exhibits introduced in evidence on my examination correctly state the weights and the division and section in which the grain was placed, or from which it was taken, in the several cases. Those that were made up by me, which were admitted in evidence, are correct. Storage slip dated January 5, 1901, is not in my handwriting, but in Wil-
454 liam Clemens'. Don't remember anything about this particular lot. Storage slip dated February 5, 1901, was made out by me at the time of a replacement of grain. This slip shows that 250 bags of timothy seed was weighed up and piled on the fifth floor, Division B, Section 5, to be placed in another car. I attended to that business. The slip is in my handwriting. That correctly gives the item of where the grain was placed and what the weight
455 was. The entries made on that slip are true and correct.
456 Paper introduced in evidence marked "Black Exhibit 8."

(Objected to as immaterial and because no proper foundation has been laid for its introduction; overruled.)

Paper is as follows:

BLACK EXHIBIT 8.

Date—Feb. 5, 1901. From—stock. Car No. R, circle, R B.
Bags 250. Kind Timothy. T A B—weigher. Storage.
32862
250

32612 Replace R, circle, Q X
Fl. 5, Div. B, Sec. 5. Brand bags—A & A

WITNESS (continuing): The word "replacing" on this slip means that that car was used to replace another one. The other car was in the same division, B, Section 5. I know of my own knowledge that this replacement actually took place.

457 The slip dated January 4, 1901, was made by me on that date. It means that on that date 250 bags of timothy seed were placed on the fifth floor in Division B, Section 4. The weight was 30,549 pounds. I know of my own knowledge that that grain was stored in that division and section. The memoranda on the slip are true and correct.

Paper introduced in evidence, marked "Black Exhibit 9."

(Objected to; overruled.)

Paper is as follows:

BLACK EXHIBIT 9.

Date 1/4/01. From—stock. Car No. R, circle, Q N Storage Bags—250. Kind—Timothy. T A B—weigher.

30799
250

30549

Fl. 5, Div. B, Sec. 4. Brand bags, Amer.

WITNESS (continuing): The slip now handed me was made partly by me and partly by Mr. Clemens. About 24 drafts was made by me. Clemens made the entries with regard to the division and section. I don't know of my own knowledge what the slip
458 refers to. That was weighing grain in. Don't remember where it was placed in that case. There is nothing upon the portion of the slip made by me that aids my memory in any way as to where the grain was placed. Slip dated March 19, 1901, was made by me. I know of my own knowledge the work done to
459 which that slip has reference. It shows that 250 bags of timothy, weighing 32,220 pounds, was placed on the third floor, Division D, section 7, to replace another lot. The other lot had been taken out of the same place. The entries on the slip are made by me, and are true and correct.

Paper introduced in evidence, marked "Black Exhibit 10."

(Objected to; overruled.)

Paper is as follows:

BLACK EXHIBIT 10.

Date—Mar. 19, 01. From—stock. Car No. R, circle, S D Bags 250. Kind—Timothy. T A B—weigher. Storage.

32470
250

32220 Replace

Fl. 3, Div. D, Sec. 7. Brand bags—A & A

460 WITNESS (continuing): I don't remember of any other cases of replacement where the National Storage Com-

pany had their tags on file. There were cases, but I don't remember any particular one. I remember such a division and section as D.1 on the third floor. Remember of some seed being replaced in that direction, but could not
461 give the date. There were several changes in that section, I know, and some since January 1st of this year. I made all of the four slips now shown me. They are all replacements on the third floor, Division D, Section 1. The entries on them are true and correct as to the matters therein referred to. They all show that there were replacements on February 6th, March
462 4th, March 15th and April 13th, 1901. There might have been other replacements, I don't know. The February slip shows that eighty-nine bags of timothy seed, weighing 11,385 pounds, have been replaced. The next one shows that 250 bags of timothy seed, weighing 31,082 pounds, were put in. The next one shows that 250 bags of timothy seed, weighing 31,519 pounds, were put in. And the last one shows that 250 bags of timothy seed, weighing 32,352 pounds, were put in.

Four papers introduced in evidence, marked "Black Exhibits 11, 12, 13 and 14," respectively.

(Objected to; overruled.)

Papers are as follows:

BLACK EXHIBIT 11.

Date—Feb. 6, 1901. From—stock. Car No. R, circle R D Storage.
RBR. Mrkd R, circle, R A Bags—89—Kind—Timothy T A B—weigher.

11474
89

11385 Replacing R, circle, R A
Fl. 3, Div. D, Sec. 1. Brand bags Marmony & Amer.

BLACK EXHIBIT 12.

Date—3/4/01 From—stock. Storage.
R. R. R, circle, R V Bags—250. Kind—Timothy. T A B—weigher.

31432
250

31182 Replace. 3 D 1. Brand bags—Naomi.

BLACK EXHIBIT 13.

Feb. arch arch and Date—Mar. 15, 1901. From—stock. Car No. R, circle, S B
Bags—250. Kind—Timothy. T A B—weigher. Storage.

31769
250

31519 Replacing R, circle, R V
Fl. 3, Div. D, Sec. 1. Brand bags—Naomi.

BLACK EXHIBIT 14.

Storage slip. Date—4/13/01. From—stock. Car No. R, circle, S T
Bags—250. Kind—Timothy. Date received—4/13/01. T A B —weigher.

32602
250

32352 Replace
3—D 1. Brand bags—A & A

WITNESS (continuing): The slip now shown me was made by Clemens and myself. I remember the occasion. That refers to a replacement; 249 bags of timothy seed, weighing 31,083 463 pounds, replaced May 1, 1901, Division D, Section 6, third floor, are referred to in this slip.

Paper introduced in evidence, marked "Black Exhibit 15."

(Objected to for the same reason the former ones were objected to, and for the additional reason that the paper was in part made by a person other than the witness; overruled.)

Paper is as follows:

lay BLACK EXHIBIT 15.

Storage slip. Date—5/1/01. From—stock. Car No. R, circle,
Kind—Timothy. W. C., T A B—weigher. T. B. Bags 249

31332
250

31083 Replace
Div. D, Sec. 6, 3 floor. Brand bags—A & A

464 WITNESS (continuing): These slips handed me this morning went to the book-keeper, Vaas, in the regular course of business.

I know Mr. Rand, inspector for the National Storage Company. Could not say exactly how often he visited the Rodgers premises during the time that I was there last fall. Could not give

465 any number of times that I have seen him there since the first of January, 1901, and up to the fore part of May. It was about

466 once a week, I think, that is my best recollection. These tags of the National Storage Company were on my person or on my desk during the interval between the time they were taken off the piles and the time that I saw them replaced. Mr. Rand was over there at the warehouse in one case after I had taken the National Storage Company tags off the pile and shipped out the car. While down there he asked me if I had torn his tag up. That was a car that had been shipped out, one that he came down there to release; it was shipped out before he came down. I could not say how many conversations of that kind happened where the matter was spoken of in that way. There was more than one; cannot state how many.

467 Q. Did any such thing happen in cases of the shipment out of a lot and you were taking the tag off where the lot was replaced, did any such conversation occur?

(Objected to; overruled.)

A. No, there was not any conversation as to replacing.

WITNESS (continuing): In reference to the tin signs, I examined the premises the morning of the last day that I testified. I visited all the floors. On the 8th of May there were bags actually piled before the six blue signs that I testified about the other day. Not before all of them, two or three. I could not say. There

468 were six of these tin signs to my knowledge. They were, at a rough guess, fifteen or twenty feet from any window. If you were close enough you could read them, that is all. If you were five or six feet from them. If anybody stood at the door leading into the particular floor in which a tin sign was placed he could not read the tin sign from the door.

469 There were no signs of the National Storage Company on the outside of the building, to my knowledge. The replacements were made immediately; as soon as we got the car out and shipped, then the other car would be put in its place. I could not recall any particular case in which that replacement did

470 not take place on the same day.

Q. State whether it is not a fact that you have had some of these cards in your possession for three or four days at a time.

(Objected to as leading; overruled.)

A. I cannot recall any instance now; cannot recall any instance where I had the tags in my possession for more than a day at a time.

WITNESS (continuing): After Bard, the custodian for the receiver, came to the warehouse on May 8th, neither Mr. Rand nor any one representing the Storage Company was there at that
471 time, to my knowledge. I could not say whether Mr. Rand or any one representing the Storage Company was present at any time when these replacements of grain were being made that I have testified to. I could not state whether or not Rand or any one representing the Storage Company was present at any time when cars were shipped out and taken out of storage by me. Mr. Rand was present, as I have previously stated, in one case to furnish a release slip when, as a matter of fact, the goods had been shipped out prior thereto. I understand that Clemens at the present time is working for Foss on the Board of Trade, as weighmaster.

June 10, 1901, examination of T. A. Black resumed.

Cross-Examination by Mr. Elsdon.

473 I left the employ of Alexander Rodgers on May 8th. Was there on the premises three times after that day. The custodian had me down there to help him take an inventory of
474 the stock. I helped take that inventory. We listed down all the goods that had tags of the Storage Company upon them, listed the goods with the tags of the Storage Company on them separately. The second time I was there was on the 9th. He told me to go down, and when I got down he didn't need me. Went inside the premises up to the office on the second floor. Think that was as far as I went. Did not go through the building that day.
The third time I went down was to look at these tin tags
475 for Mr. Wyeth. That was the day when I last testified. I went all through the building that day. I went there to help him make an inventory on the 10th of May. That was the second day after the bankruptcy proceeding was filed.

I began to work at the warehouse about December 1, 1899, as foreman. I did most of the weighing in and weighing out and oversaw the changing of the seed, and giving directions to the men. The seed was weighed in the basement and on the second floor. I spent most of my time on the second and sixth floors. The sixth floor is where we dumped the seed and cleaned it; we dumped it

into the bins to the surface cleaners. Could not tell how much time I spent on each floor each day; sometimes it would be
476 only a short time, and others it would be half a day. I mean by "short time" that it might be an hour. I was up there on the sixth floor most of the day; about, on an average, three days each week, could not tell exactly. That would be six half days. I had something to do with the loading and unloading of cars; did the weighing. We did the weighing and unloading of cars in the basement. I didn't have much more to do with the seed outside of the building than to examine the cars and open the doors; generally opened the doors of the cars. When seed was weighed out and shipped on the cars, I had something to do with seeing
477 the seed loaded on the cars. Just saw it loaded, that is all. I counted the bags when I weighed them. They were weighed in the basement. When put into the cars they did not go into the basement, they went into the second floor, and then ran down into the car through the spout, so that when a car was loaded with seed I knew when it was loaded, knew what was on the car and knew the time of day when the car was loaded. I have known of an empty car being put in there at night on the track beside the building and loaded the next morning. Could not say how
478 many times. It happened several times. I had been working there at 7 o'clock in the morning, sometimes might have been a few minutes late. All the men working there had to work at 7 o'clock except the office help. They knocked off at half past five, and half an hour for lunch, so that they worked ten hours a day. I have begun loading a car at 7 o'clock in the morning. It would take all the way from three-quarters of an hour to two hours. I have been able to load a car in three-quarters of an hour, and it took all the way from that up to two hours. I wrote out the
479 railroad receipts for seed loaded by us. After I wrote it out, if it was on the B. & O. I would generally take it down to the B. & O. man. He was about a block from there. He would check the number of bags in the car and sign the receipt. Those receipts were not, to my knowledge, issued before the grain was loaded on the cars—I am sure of that. I saw every load of grain that was loaded on the cars except the time that I would be out of town. A car loaded with grain could not have left that place without my knowing it. I didn't check every car. I wouldn't be up on the sixth floor when they were loading cars, that is, I would not be up there when I supposed there were cars being loaded. I couldn't say that I knew what was going on down there when I was on the sixth floor, but when I was up there the
480 men would be all with me, and there wouldn't be anybody to load the cars up. Am prepared to state positively that a

carload of seed in bags would be loaded in three-fourths of an hour to two hours. When seed was on the fifth floor they were loaded on trucks and taken on the elevator down to the second floor. Six bags were put on a truck at a time, and there were six trucks, two trucks on the elevator at a time. That is a freight elevator and not as fast as these elevators in this building. When those two trucks went down they went to the second floor. There they were
481 weighed and thrown down the chute, retained in the bags. That was a large chute. The other end of it was in the car. While that was being done I was on the second floor. While the two trucks were run over to the elevator there were two more put into the car, that is, there were two trucks being brought down to the second floor on the elevator while we were running these into the chute. About six men worked at that work of loading and unloading trucks. The National Storage Company had no seed on the sixth floor, they didn't use that floor. The signs on the bins that I spoke of were on the second and fifth floors. The
482 sign on the bin was near the north-west corner of the bin, and the bin is on the north half of the south half of the building, in the east end. The stairs are on the south end of the south half, near the west end, pretty near the center, from the east to the west of the building. Don't remember exactly what was on that sign on the bin. Saw six of these tin signs the last day I was up there. I said they couldn't be seen if there was
483 a carload piled in front of them. They couldn't be seen standing on the gangway in front of the carload. Am sure of that. That would depend a good deal on the height of the man, he would have to be ten or twelve feet high to see them, because you couldn't see the tag over the pile. It is not a fact that the tin sign was put near the roof and above the pile of sacks. It was just in front, nearly on a level where the top of the pile of sacks comes to. Well, it may be that it was above the level of the pile of sacks. The pile of sacks in those sections was about seven feet high. I don't think that some of these sacks were a good deal closer to the window than fifteen or twenty feet; am not
484 willing to swear positively that that is the fact. I don't know the distance; I just guess. There are a good many windows on those floors, almost a perfect string of windows on the south and west sides. I spent some time on all the floors; on some of the floors we would be replacing cars or taking out a car. That is all, though, the time that I would spend on the other floors, other than the second and sixth. I spent a good deal of time on the second floor; couldn't say how much. The offices were there; have not had anything to do with the office work for some time. I did general office work when I first went there, such as filing away

485 papers; then I spent about all the time in the office. That was from December, 1899, to October or November, 1900; so that for ten or eleven months I worked constantly in the office. The stairway leading up to the second floor from the first floor does not lead into the office. It is outside, and to the east of the office. Could not say how far. When I testified that as near as I could remember I saw Rand there about once a week, I didn't mean to be understood as testifying that he was only there once a week. I believe I said that as far as I could remember, he was there once a week.

486 He might have been there without my seeing him, and a good many times that might have been so. I never placed signs on the original lots of goods; Rand did that. I couldn't mention any specific time where a lot of seed was to be weighed out where I tore up the tag. I know I did it, but do not know how I remember it; could not say who told me to do it. I couldn't give you any date or any specific time when I took a tag off when the goods were to

487 be removed and replaced with other goods, and after the replacement put back the tag on the goods. I did it a good many times; could not state how many. Am positive of that. Couldn't say how many times I tore up tags; it was once, anyway. Cannot tell the one time that I am sure of, nor what the goods were, nor where they were, nor anything about it. Am positive that was the case that where the goods were shipped out I tore up the tag. I

488 think there was one tag there that was lost that Vaas changed; that is, he didn't change it, but put on another tag; wouldn't know that tag if I saw it. I heard Vaas say that he did it; didn't see it myself. Am simply testifying from hearsay; couldn't tell what time it was Vaas made such statement to me about it; presume it was about the time he did it. Think it was along about the first of May of this year. Didn't tell me when he had done it.

489 We shipped grain over other roads besides the Baltimore & Ohio. The Chicago Terminal Transfer had charge of the loading, the Chicago & Great Western. The latter road had sent in the cars direct, but other roads had sent them in through the Chicago Terminal Transfer. This loaded grain went over more than those two roads, the Chicago & Great Western and the Baltimore & Ohio. Am not sure where the office of the local agent of the Great Western road is, but believe it is down on Harrison street and Fifth avenue, in the city here. Had nothing to do with getting receipts from that local agent. They would send down a messenger with the receipts. I did not always personally get receipts from the B. & O. local agent. I got the receipt from the local agent, where I personally attended to it, just a few minutes after the grain was loaded, as soon as he would count the number of bags in the car. He always went right over and counted

490 them. Sometimes he had other work to do; sometimes he came right down. He generally came immediately after I went for him; couldn't say he always did. These receipts are the ones on which the bills of lading were issued. I have gotten a bill of lading on one of those receipts at the B. & O. office here in town on a receipt issued by the local agent out there. Am positive of that. Have gotten a bill of lading on receipts issued by the other local agents of the other roads. The Terminal Company stamped the receipts that were made out. That is what the local agent of the B. & O. did. Never knew of a bill of lading being issued
491 or stamped by the Terminal Company. I cannot identify any particular carloads that were loaded there at seven o'clock in the morning. Couldn't say positively on what road, or over what road any carloads loaded at seven o'clock in the morning were sent or shipped. My recollection about that is considerably vague. I testified that I took off the National Storage Company tags if Rand had not been down. I mean by that that in some cases when he could come down and take the tag off, as where we had a car that wasn't in a hurry to go out, they would wait until Rand came down. If there was no hurry about the shipping out or weigh-
492 ing out of a load, I didn't take the tag off, but waited for Rand, and he took the card off in those cases himself. He was usually down there at those times to take the card off. He had something to do with the release of the goods. The papers marked "Black Exhibit 2," "Black Exhibit 6" and "Black Exhibit 15," which I have identified, are partly in my handwriting. I wrote the word "replace" on Black Exhibit 6. All of Black Exhibit 6 is in my handwrinting except six drafts or figures.
493 These numbers that were put on there in my handwriting were put on at the time the car was being weighed; at the time that the goods were actually weighed. I weighed them myself. As to the other two lots, Black Exhibits 2 and 15, I don't know in reference to the replacement myself. I know that Black Exhibit 6 replaced a previous car. This is the weighing-in receipt. I couldn't say whether this word "replace" referred to taking grain out for the purpose of cleaning it, winnowing it, and putting it back again, in the case of any of these memoranda. In other words, I don't know, of my own knowledge, in every case that I have testified to that there was a replacement, and that the grain actually left our building. I cannot tell of any one case in which I know that
494 positively without looking at the weights of the cars going out; that is, not without looking at some other paper besides this memoranda. The word "replace" where it occurs on these memoranda does not, so far as I know of my own knowledge, mean that the goods left the building and were shipped away. I turned

these over to the book-keeper after they were filled out. Those that I weighed I handed to him. I did the footing of the number of
495 pounds as soon as the car was full, and handed it to the book-keeper before these memoranda were handed to him. I don't know of my own knowledge what the book-keeper did with these after I handed them to him. I put the word "replace" on these memoranda at the same time I made up the ticket. No one told me to put it on there. It was only put on in cases where the car had to be put in store to replace another one. I only know it was put in store to replace another car; some one told me.

Q. So that when a lot of grain came into the building and you weighed it in, you sometimes would put the word "replace" on the memoranda after you had weighed it, because some one told you it was to take the place of other grain that had been weighed out; is that right?

A. I would know if I had had the card or ticket in my possession.

WITNESS (continuing): I would have the National Stor-
496 age Company ticket that this car was replaced; that the other carload had gone out. I don't know anything about the issuing of the warrant with reference to this replacement; had nothing to do with that. I simply know that sometimes grain went out, was weighed out, and afterwards other grain would be weighed in. When a car was going out somebody would tell me then whether it was to be replaced or not. They gave me no reason why it was to be replaced; would simply tell me that this lot of grain that is going out is to be replaced by some other grain. That would come
from the office. Rodgers sometimes would tell me direct, and
497 sometimes other people would tell me; that is all I know about replacing; don't know anything about the release and the issuing of new warrants with reference to what I call replacements; could not say how much of the time it was the custom for me to take the tags off and replace them. It would be nearer two-thirds of the time than a quarter or a third or half of the time. That is, I think two-thirds of the time when the seed left there they left in
a hurry, and a third of the time there was plenty of time to
498 have Rand come down and take the tags off himself. I am not positive as to the exact time; do not like to say any definite time; simply wish to be understood as testifying that when there was an order for seeds that needed to be shipped out in a hurry I myself would take the tag off, and when the replacement took place would re-attach the tag. Would not undertake to say how often that occurred. I said I could remember that with reference to this memorandum covering seed in Section 1, Floor D; it had been replaced some time since January 1, 1901. That numbered section

was a little larger than the others, and I remember telling the men to pile it so as to keep a space between the two rows in that section, and that enables me to state definitely with reference to it. I wanted a space between the two rows because there were two different stocks of seed and two different marks we had on there, and I wanted to get at them so that I could get samples of either
499 one that I wanted. There was a larger space than usual, plenty of room in the space for spreading the bags a little more than we usually did. That is the only thing that enables me to remember about that specific lot. That was in the same position that these others were that I testified to, where seed was weighed out by me and then later on other seed were weighed in, and I was told that the seed that was weighed in was to take the place of that which was weighed out. Don't know what became of these memoranda after they went to the book-keeper. I testified that I talked more than once, but was not able to give the number of times, with Rand, when he asked me if the tags that I had removed had been torn up; that is, tags where he had come down to release the
500 goods. Could not give the date of any such conversation; cannot give the month; couldn't say positively whether it was this year or last. Cannot remember where the conversation occurred, or with reference to what particular lot of goods. The conversation occurred in the office, but I don't remember what particular lot it was about. I remember the conversation, that is all. Rand gave me no reason for asking that question. Don't remember in that case whether I had already torn up the tag referred to. He had come down there to release the goods covered by the tag, and I had already torn up the tag. Could not remember whether I said to him that I had already torn up the tag, or anything
501 particular. Rand asked if it had been torn up. Don't remember what reply I made to him, whether I told him that it had been torn up or that it had not. It is not possible that I turned the tag over to Rand at that time. I had either torn it up or given it to Vaas. What I didn't tear up myself I gave to Vaas. Don't know what he did with them. Didn't have charge of those blank tags that were in the office. They were not in my desk or in my possession, but in charge of Vaas. Don't know anything about the numbers on those tags, what tags they were, and what particular numbers, at the time the petition was filed. Had nothing to do with taking the releases from Rand for these goods; don't remember that I ever got a release for any of them; don't know any-
502 thing about when the releases were issued with reference to the removal of any particular lot of goods. I testified on my direct that Rand came there on one occasion for a release of goods that had been previously shipped out. Don't know the time nor the

particular lot. Couldn't say whether it was this year or last; have no idea as to the date. Don't remember what kind of seed it was or what floor it was on. Don't remember anything about that. Vaas was in the office at the time I had this talk with Rand; don't think he took any part in the conversation. Rand just asked
503 me if I had torn up the tag; that is the time when he asked me if the tag had been torn up, this conversation that I testified to formerly. I know that the goods had already gone out from the warehouse. Don't know whether they had left the sidetrack at that time. Couldn't say how long it was after I had completed loading the goods; don't remember whether it was the same day or anything about that, whether it was a few minutes after or a day after. Don't recollect what Rand said when he found that the goods had been shipped out. He just asked if the tag was torn up. Don't remember whether anything was said with reference to the shipment being made before the goods were released at
504 that time. The inventory that I spoke of having helped to make was taken on a piece of paper and then copied in a book. Did not have anything to do with copying the memorandum in the book. The original memorandum was on sheets of paper, but I didn't make any original memorandum; didn't do any of the writing. Wouldn't know the book if I saw it. Would know the paper if I saw it. What I had to do with making the paper was to call off the kind of seed, number of bags and the weight, and he wrote them down. In the case of these goods covered by the Storage Company's receipts or tags, I called off the number of bags
505 and kind of seed.

Q. And how did you indicate that the storage company had the tag on?

(Objected to as not cross-examination; sustained.)

Cross-Examination by Mr. Kerr.

506 WITNESS (continuing): I said I went through the warehouse with Bard, the receiver's custodian. That was the first
507 time I saw Bard up there, and I went through all the floors at that time. Bard asked me to go through the building. I went
508 through all the floors, including the fifth; showed him the piles of seed that were there. He could see them all when he was there, and the other floors the same; we made a circle around the fifth floor in front of the gangway; went the entire length of all the gangways. Spent less than five minutes on the fifth floor. Bard and I did not look at the different piles as we walked along. Neither of us were blindfolded when we went through. I don't know what his object was in going through, but he asked me

509 to take him through, and I did. He saw the piles, but did not look at them individually. I know this because he didn't stop. The piles were about a carload, I suppose, seven feet of the gangway by twenty-one feet back; then the others would be alongside of that. He walked along the gangway in front of these piles. I did not point out anything to Bard on the fifth floor.

Q. Did you say anything about whose property that was on the fifth floor to Bard?

(Objected to as not cross-examination.)

The REFEREE: I think you will have to make him your own witness. With that understanding, you may examine him as to what was said.

510 A. I don't remember saying anything to him.

WITNESS (continuing): Did not say anything to him about the National Storage Company representing any of that property, or having issued their warrants on any of the property. Did not say a word about the National Storage Company on any floor in that building that day.

Cross-Examination by Mr. Peckham.

I testified that at some time after May 1st the seed that was in Division D, Section 10, on the second floor was changed. The paper handed me is the right receipt, and is Exhibit Q, Hoge. I don't know the date when the change was made without looking at the weight ticket. (Witness looks at weight receipt.) That

511 was replaced on May 7th. On that date 250 bags of Hungarian seed which had not been there before was put there in place of that which had been there before. The receiver came in on May 8th. There was no substitution of that particular seed after that which I have just described, so that the 250 bags which were put in there at the date I have mentioned were there when the receiver came in. The seed mentioned in Exhibit J. Hoge was one of the cases where there was a substitution as I have testified. It was replaced on February 6th. There was a substitution after that replacement prior to the time when the receiver came in. It was replaced on March 4th; 250 bags of timothy seed was put in there in place of it. That deposit of 250 bags of timothy seed was changed March 15, 1901, when 250 bags of timothy seed was put in. Another substitution occurred on April 13th, when 250 bags of timothy seed was put in. Don't know of any substitution after that; think that that remained undisturbed until the receiver came in. It is not likely that there could have been any substitution after that without my knowledge; am sure there was none; so that when

the receiver came in, there was 250 bags of timothy seed in Division D, Section 1, on the third floor, corresponding to the description of everything in the receipt handed me. If you had brought that receipt down on the morning of the day when the receiver came in,
513 and presented it, and said you wanted to see the property, I would have taken you down in Division D, 1, and you would have found the property there which this receipt describes, the only difference being the number of pounds weight. In that particular car there would have been more pounds weight than the receipt calls for. There would be quite as much as the receipt calls for. With reference to Exhibits R. Hoge, S. Hoge, T. Hoge, O. Hoge, M. Hoge, N. Hoge, L. Hoge, H. Hoge, K. Hoge, G. Hoge and I Hoge, handed me for inspection, I don't think there are any other lots among the ones described in these receipts that I testified to. I don't think there is any other that I mentioned specifically in testifying on the direct.

Re-direct Examination by Mr. Eschenburg.

When I was examined with regard to the loading of the cars at seven o'clock in the morning, and testified that my recollection on that subject was vague, I meant that my recollection was vague
514 as to any special car, but it is not vague as to having loaded cars out at seven o'clock in the morning. When seed is taken out of the warehouse for cleaning and winnowing, it is customary in warehouses like that to put a car with a like amount of seed to replace it. If the seed was marked with Rodgers' private mark, it was marked on the top bag, that is, where it was sewed, close to the seam; that is what you call the top bag. As a general rule, the same lot of seed would go through this cleaning or winnowing process but once, but in case of an extra dirty car it would be two, sometimes three times. That would generally be done
515 right after the first process. We would keep on running the same car. I testified on cross-examination that these replacements might have been made for the purpose of cleaning the grain. That would not be true in all instances as in the specific instance in reference to which I was examined by Mr. Peckham, where the same lot was substituted five or six times. The same lot of seed would not have gone out five or six times for cleaning purposes. I would say that in that instance the seed left the warehouse, if it had been cleaned. All that left the warehouse had been cleaned. But the previous question was about moving a car to be
516 cleaned, and the car that was moved, if it was moved to be cleaned, had to be moved to be cleaned. A car was never

moved that was not cleaned. Everything that went out from there was cleaned.

Q. How many times was the lot that was covered by the warehouse receipt, Division D, Section 1, replaced, according to your weight slips?

(Objected to; overruled.)

A. It was replaced four times.

WITNESS (continuing): It was not done for the purpose of cleaning the grain.

Re-direct Examination by Mr. Wyeth.

Having my attention called to the exhibits shown me by Mr. Peckham, in his question as to whether I testified to any of the lots mentioned in that bunch of warehouse receipts, and also to
Exhibit "Black 10," that is the case that I may have testified
517 about. The division and section is D, 7, third floor. I may have misunderstood Mr. Peckham's question. I understood him to ask if there were specific cars that I remembered about that they asked me in the other examination. I didn't understand that he meant this here that I testified to about replacement. That is, without the storage slip in hand I don't remember whether or not I testified as to any specific lots mentioned in those warrants, or testified specifically. Don't remember that of my own knowledge without the slip.

Re-cross Examination by Mr. Peckham.

There was a substitution of property covered by the ware-
518 house receipt marked "Exhibit L. Hoge," covering 247 bags of timothy seed. It occurred on March 19, 1901. The substitution that was put in in place of that which had been in there before was 250 bags of timothy seed, weighing 32,220 pounds net. That was the last substitution prior to the time the receiver came in. If you had presented this receipt that we are talking about to the storehouse on the morning of the day when the receiver came in, or at any time before he came in, and demanded that property, I would have delivered you the 250 bags of timothy seed, weighing 32,220 pounds, which I had last substituted there, as I have just stated.

Re-cross Examination by Mr. Kerr.

Referring to the storage warrants of the National Storage Company, marked Exhibits R-1, R-2, R-3, R-4 and R-5, I find that two of them have been replaced. I testified about these two on my direct examination. Referring to R-2, No. 9155, for 250 bags of timothy seed, said to weigh 30,421 pounds, dated January 5, 1901, there were 250 bags of timothy seed in store when this paper was issued. I don't know of my own knowledge what was done with those 250 bags. I know that another 250 bags was sub-
520 stituted in its place on February 5th. Those 250 bags weighed 32,612 pounds. I don't know by the paper handed me whether this 31,612 pounds was substituted in place of the original 250 bags; maybe the storage book will help me on that. It will tell me that mark that it was issued for. I didn't make the memorandum in the storage book. It will tell me whether this memorandum I got on here was that particular car. I can only tell from my own memorandum that there was a car substituted, but not which one; don't know anything about that warrant. Can tell that this car replaced a car marked "R. X." Cannot tell what mark was on this. Know these 250 bags were shipped out,
521 because I have memoranda here in my handwriting showing that I put another car of seed in that section. I know this particular lot was shipped out of the section. I said that a carload of timothy seed was placed in the section indicated by this storage warrant "R.2." It was left there until Rodgers' failure; so that if you had presented this warehouse warrant No. 9155 at any time before Rodgers' failure that seed would have been delivered to you on this warrant. The difference in the size of the bags and different kinds of seeds makes 250 bags, in one place weighing 35,000 pounds, and another 250 bags weighing 32,000 pounds. I could testify that warrant No. 9204, Exhibit R-4, purporting to be
522 250 bags of timothy seed, was moved out. Don't know the date, but you can get that from the sales book. The new car was put in in place of this on April 16th. I have it here as 250 bags of timothy seed, weighing 31,794 pounds, placed on the fifth floor, Division B, Section 30, to replace the previous car. I made that memorandum. I have no independent recollection of it so that I can testify from recollection after refreshing myself with the memorandum and swear simply by the memorandum. Have no recollection of that particular car. The seed that was replaced weighed 31,794 pounds, and the lot of seed there before was
523 31,892 pounds. The seed that was thus substituted in April remained about a week, when it went out and was replaced on April 13th by another car, weighing 29,341 pounds, nearly

2,000 pounds less. Don't know how long that remained. It was replaced again on May 7th. That remained until the failure. If you had gone there any time on the 7th you could have had the seed that was placed in this section. I directed the placing of those two lots of seed that I have just now testified about which were left there until the time of Rodgers' failure. I represented Rodgers.

Cross-Examination by Mr. Elsdon.

These private marked cards having a private mark of
525 Rodgers were generally put on the front of any pile of seed that we had up there, on the same piles that the storage cards were on. They were put on to identify them; the weights and location generally. Didn't have Rodgers' name on them. It is a blank tag, a blank mark, so that we can identify the goods.

Q. When you refer to grain that was loaded at seven o'clock in the morning, you are not able to state that any grain that was loaded at that time in the morning was grain that was weighed out from sections having the tags of the Storage Company on them, are you?

A. I couldn't name any special lot. We have got some now with the cards of the National Storage Company.

WITNESS (continuing): I don't know of any special lot that went out at that time in the morning that were taken from these sections having the Storage Company tag; I know it was done,
525 but I couldn't tell any specific time. I know that shipments were made beginning in the morning of lots that had Storage Company's cards on; am simply unaware as to what particular lots they were. Am positive that lots went out from sections having the Storage Company card. I know it was cleaned seed that was in Division D, Section 1. Seed generally has to be cleaned but once without any reference to the time it remains in storage. That
526 does not make any difference; it does not get dirty lying in bags; it may get dusty, but that does not affect it. I remember specifically about that particular lot that was not replaced for the purpose of cleaning. Am sure there was no cleaning done to that lot at all. Know that of my own knowledge.

June 19, 1901.

WILLIAM CLEMENS, sworn on behalf of the receiver, examined by Mr. Wyeth, testified as follows:

527 Was in the employ of Alexander Rodgers about eight months up to his failure. Was weighing most of the time, and working as a clerk at the warehouse. Passed most of my time on the second floor, in and around the office. Can hardly say 528 just how much time I would be engaged in the weighing in or out of seed; it would probably be several times a day. I know Mr. Rand is inspector of the Storage Company. I have seen him call at the warehouse from time to time. He visited the place, to my knowledge, at least once a week; saw him mostly in the office, going in or out of the office. I have not seen him on any floor but the second, but I have seen him going to the third floor from the second. Am acquainted with the National Storage Company tags that were on certain piles from time to time in that 529 building. In cases of the shipping out of carload lots of grain somebody removed the tags from the piles before the seed was taken out. Do not know what became of the tags when removed. I had work to do in cases where piles or lots of seed were weighed out and shipped away, and the piles replaced with other seed on which the National Storage Company tags had been placed. As far as I remember, the tag was taken from the pile and saved or put somewhere after it was so replaced, and put back on the pile that replaced it. I know of cases where Thomas Black did that work of taking the tag off and replacing it. Could not definitely state just how many, but should say five or six times, anyhow. I don't know that I remember any instance where Rand was over at the warehouse and had anything to say with regard to the National Storage Company tag as to any piles that had 530 been shipped out. Don't remember any conversations as to the tags, about who removed them. I made the memorandum marked "Black Exhibit 2." That had reference to replacing some pile that was taken out. It was made at the time of the replacement. As far as I can remember, the memorandum of the 531 date and the other items as to weight, etc., are correct. The lot that had replaced a prior lot was put on the third floor, in Section 10,-D, 10. This part of the memorandum is mine also. A portion of Black Exhibit No. 6 was made by me. There are five or six drafts in my figures, along the first part of the replacements. Those weights as made by me there are correct. Don't remember the transaction referred to in that exhibit, as to what it was. I

Will-
s. couldn't say whether it was a shipping out of grain or a re-
532 placement, or what. A portion of Black Exhibit 15 was made by me; the first portion of the drafts are my figures; they are correct. Somebody else made the total. I remember a case where a tag had been taken off and shipment made before the tag was taken off. Could not say positively whether Rand came there in such cases. He usually came there after the replacements. I don't know as. I remember any particular instances, any particular cases.

533 Black Exhibit 2 introduced in evidence.

(Objected to; overruled.)

Said exhibit is as follows:

BLACK EXHIBIT 2.

May 5/7/01 Storage.
Car No. H 33. M 40. Bags.... Kind Hungarian.
35107
250
34857

Replace

Floor 3. Div. D. Sec. 10. Brand Bags, A. & A.

Cross-Examination by Mr. Elsdon.

534 I worked there eight months for Rodgers. Would not undertake to say how many times Rand visited the premises. I stated that it was at least once a week, that is, I saw him there at least once a week; he may have been there a good many more
535 times for all I know, would not undertake to say that it wasn't considerably more than once a week that I saw him there. My work in connection with the weighing in and out of seed was not always confined to the second floor. Sometimes I worked in the basement. I never was in a car helping put the goods into the car. When weighing in or weighing out of grain occurred
536 I very often last saw the goods in the car. Did not have anything to do with the car. It was my duty to make out a receipt and have it signed by the railroad company. Could not say positively how many times I made out a receipt; it was quite often. Black had something to do with reference to weighing out the seed. I probably frequently made out the receipt and got it signed

myself when Black was in some way connected with weighing out the seed. That was with the B. & O. Railroad Company most of the time. The agent is about a block from the place of business.

I myself frequently got these receipts from the railroad com-
537 pany's clerk. Those were times when Black was working there on the premises. Had something to do with getting out the other receipts from the other railroad companies down town here. Could not state how often.

Usually went to work in the morning about eight o'clock. Was not there as early as some of the other help working there. Probably the number of men that were working there got there before I did in the morning. Never got there as early as
538 seven o'clock that I remember. Don't know that I could state positively that any of the men got there as early as seven o'clock. Don't know, of course, when the men got there that got there before I did. Sometimes had to do with running the seed down the spout into the cars when they were loaded. Helped throw them down there sometimes. An ordinary car would be loaded in about an hour or so; would not say positively just how long. It did not take considerably longer than that, as a matter of fact, to load a car with the bags of seed. I don't know as it
539 did. Could not say just to the minute. It is according to the car; I said an ordinary car. There is much difference in cars. You could put 60,000 in a car or you could put 30,000 in a car. The minimum carload is 30,000 pounds. A carload of 30,000 pounds could be loaded in an hour. I should think it takes about eight or nine men to load it in that time. Think we had as many men as that working on loading cars on the second floor. Saw some seed on that floor that we shipped out. The seed were simply kept on the second floor—a small proportion of them. I
540 didn't remove any of these bags myself when goods were shipped out. Did not put back these bags in place when a replacement was made. Don't know whether I have seen Black replace tags five or six tmes or not. Have actually seen him take the tag off and then put the same tag back on a lot of new goods. Could not state what particular lot or floor or when it was. Don't know anything about it except that he at least once took off a tag and put it back again on a new lot; would not undertake to say how many times it happened. Am sure it happened once. Cannot state when, whether this year or last, could not state whether
541 it was as much as a year ago. I don't know whether in the one instance where I saw Black take off the tag and replace it on another lot whether or not the goods were shipped out of the building. As to Black Exhibit 2, could not state of my own knowledge that the goods that were in there before the replacement oc-

Will-
iam.

curred were shipped out of the building. I wrote the word
542 "Replace" on Exhibit 2. Don't know whether or not anybody told me to write that on there. I got that information out myself, but I don't remember—because I might have seen goods taken out and put back in again; a different lot of goods. Am not able to state what the fact was about it, with refer-
543 ence to Black Exhibit 2. As to Black Exhibit 2 am not able to state that the goods that were being replaced actually left the building at this time. The goods that were taken out of there were not the identical goods that were weighed in. We don't really put back the same goods we take out. We do take goods out of the sections to clean them. After they had been cleaned they might go back to the same division and section. Don't know that the goods that were being replaced left the building. Am not able to state of my own knowledge just what became of those original goods, as to whether these are not the same goods.
544 As to Black Exhibits 6 and 15, I made those only in part. I wrote the word "Replace" on Black Exhibit 15, the same way, I suppose, as I did on Black Exhibit 2. Could not state positively whether I took it to the book-keeper or not. The totals on Exhibit 15 and Exhibit 6 are not in my handwriting. I simply know that those goods were partly weighed in by me, and somebody else weighed in the balance of them. I had nothing more to do with the memorandum. I stated that there were cases where goods were shipped out and replacements occurred where
545 Rand was not present. By that I mean he was not there when the goods were taken out. Could not state whether or not Rand was there with reference to the release of the property prior to the time that the goods were shipped out and the replacement occurred. I mean simply that he was not there at the time the goods were shipped out, or taken out of the division and section. Am not able to connect any of those shipments that occurred when Rand was not there with the removal of the tag that I testified to. Don't know anything about the cancellation of warrants and the issuing of new ones with reference to these shipments and replacements that I have testified to. Had nothing
546 to do with the releasing of the warrants and re-issuing of the warrants and cancellation of warrants.

Direct Examination by Mr. Wyeth.

Exhibit No. 2 is re-cleaned goods, I should judge from the marks on it. The marks "H.33" and "M.40" indicate that it was re-cleaned. M.40 is a stock mark. Don't remember whether it is on the back or not. H.33 is a stock mark; it is not always put on the back. It was entered in there because they were making out a bulk cleaning ticket and it was given a stock mark, and that is the stock mark for the exhibit shown me. It does not indicate that that came from a car having any such number. In cleaning the goods we give it a stock mark. That is to designate it from another lot; and in every case where it is cleaned, when it
547 first comes in, or whether it has been taken out of the pile and cleaned, it would receive a mark. This indicates nothing more than that it was cleaned before being placed in. I know all cases where a lot was taken out of its place which had the Storage Company tag on and was placed somewhere else in the building and a new lot put in its place. The old tag would stay where it was before, by putting on the "Replace," in the same division and section. I never was there when Rand released a car, I was not with him. I don't know what he did with the tag, suppose he usually took it off.

Re-cross Examination by Mr. Elsdon.

548 I said that lots of goods were taken out of one section and placed elsewhere. They might have been sold and put in store and put in another place in the same building. The goods that were taken out of one section and put in another, there were new tags of the Storage Company put in that same section. The new tag would have the section and division number, according to the then location of the grain. Couldn't say positively for what purpose that was done, whether the goods had been released before they were taken out of there or not and a new warrant issued. It was put on the second floor. Don't remember what floor it
549 was taken from; that is, it was brought from another floor in the building and put on the second floor, and then had the new tag put on it. The marks H.33 and M.40 on Black Exhibit 2 indicate that the property was cleaned. There is nothing on it that I put on that would indicate that the goods came in from the outside of the building. None of the goods, so far as I know,
550 covered by Black Exhibits 2, 6 and 15 came from the outside. The stock mark on Black Exhibits 6 and 15 opposite the car number would indicate that the goods were cleaned. The car

Will- number on Black Exhibit 5 shown me indicates that the goods came from outside the building. That is the number of the car, but (referring to Black Exhibits 1, 3, 4, 7, 8, 10, 11, 12, 13 and 14) this other in letters is representing the stock mark, and so far as the others indicate they did not come from the outside.

Re-direct Examination by Mr. Wyeth.

551 There is nothing on Black Exhibits 2, 6 and 15 to indicate that they came from the outside or the inside. As to the other exhibits of Black which were shown me, the mark "R. R. A." on Exhibit No. 11 Black, would indicate that they might have come from inside.

Re-cross Examination by Mr. Elsdon.

552 There might be the same car number on the paper handed me as is on Black Exhibit 5 if they had come from outside. There is a car number on all grain that comes in. I didn't make that out, but I made some of them out. I know the custom
553 over there as to the way of doing business. I couldn't state whether that number was on the car or not. The number of Black Exhibit 5, for instance, was a car number that was issued on the order, I suppose. I get that number from the sample that it is bought by usually. I mean by that that whoever the goods are bought from will give you a sample with the car on; it is simply with reference to some particular car number that is on the car or on the lot of grain identifying it. I didn't put the car number on there. Would not state where this number on Black Exhibit 5 came from. I might have put car numbers on these memoranda. When I did I got them from some order of some kind.
554 on Black Ex. 5, I should judge that that would indicate that the lot had come from the outside, at the time it was put in storage. These others that I testified about have no car number on them. That fact would indicate that they came from the outside. As I said before, these goods that came from the stock might have come from the outside. If they came in from the outside they would have the car number on them, the same as Black's Exhibit 5. These memoranda that I am testifying with reference to are different slips from the slips that we receive by— If they put the car number down I would copy the slip that I received
555 on to here, so far as the numbers are concerned. I don't know whether those had the car number on when they came from outside the building or not. When goods came in it usually has the car number. Black Exhibit 5, if it had no car number on it to

indicate that it came from the outside, would have the stock mark that we give them after they clean the goods. I would not be able to state positively if any of these other memoranda had a car number on similar to Black Exhibit 5, that it came from the outside.

I said there might be something on Exhibit 5 to indicate that
550 it came from the outside, but am not positive that Exhibit 5 came from the outside.

EMIL VAAS, called and sworn on behalf of the receiver, examined by Mr. Wyeth, testified as follows:

Was in the employ of Alexander Rodgers up to the time of his failure, from the second day of January of this year, as bookkeeper. Know Rand, the inspector of the National Storage Company. To my knowledge he called at the building during the time I was there, possibly between fifteen and twenty times; that is, from the 2nd of January to May 10th. I passed my time in the office, usually from eight o'clock in the morning till ten, and
557 from one until five, or half-past five. Am acquainted with these National Storage Company tags that were placed upon piles of seed. As to what was done with those tags in cases of shipment out of lots that had had those tags on them, whenever a car was released by the company the tag was laid on my desk. Sometimes Black would bring it, sometimes it would be on my desk when I got there, put there during my absence. Sometimes Rand would bring it. In case there were replacements of lots which had had on them the Storage Company tag, that tag was not delivered to me. Cannot tell what was done with it. I
558 mean I had nothing at all to do with it. Never had any conversation that I remember with Rand with regard to the placing of the tags or taking them off a lot. If Rand released a car he would bring the tag down. When a car was released and shipped out before Rand came down he would ask me if I had the tag. Rand would bring down a release; that is a document
559 releasing the car to take it out entirely. The release might be brought in during my absence. I might call for a release and the release might be brought down when I was not there. If we had an order for a car we called upon the National Storage Company and asked them to release a certain car and give us the papers so that we could go down to the bank. We did that in some cases. I probably would have the tag on my desk before the release came. Don't know whether or not the tag was there in any case before I called up the Storage Company; don't remember. I remember Rand asking me when he handed me the release if I had the tag.

Think in one instance I had the tag on my desk; could not
560 specify the instance itself. Could not say positively whether there were any other instances. I said I remembered the occurrence of the fact that Rand came with the release and made inquiry with regard to tags. Would not state positively how
561 many times the thing occurred. Could not name any number of times.

Q. Now, the question I am asking is whether you can say there was more than one case?

(Objected to; overruled.)

562 A. Why, I think there were more cases; yes.

WITNESS (continuing): I would tear up these tags usually after I received them, closing up the incident with the Storage Company. I possibly kept them for an hour or so until I got to them. If Rand did not happen to call until I got back from the office I would keep them until he came. Have seen "Rand Exhibit 23" before. It is in my handwriting. I believe this tag refers to a tag that my attention was called to as being lost, and it was not on the pile representing the 250 bags of timothy. I think it was on May 10th last Rand, the inspector of the company, called
563 my attention to it. At the time we were going through the place checking off the different lots. Rand, Black and Bard were with me. Rand called my attention to the fact of a card being missing. We were in the basement when it occurred. I found the pile there without a card on that he spoke of in that way. Rand asked me to put a card there, or replace it, or have a card put in its original place. He asked me to make out the card because I usually made out all the cards in my handwriting, and I took this card, I think, from the top card in the pile, in my large office desk in the office. I think Rand and I walked together to the office, and I got out this card and handed it to him to put in its place. I didn't see it put back on the pile. Delivered it to
564 Rand. That was the last I saw of it that day. Next saw it just now. I have seen a card laying on the desk here; could not see the face of it, could not identify it. Buyers of Rodgers were accustomed to go to this warehouse of his on Johnson street. Occasionally in the sales that Rodgers makes he makes the sales to parties by their calling there at the warehouse, or elsewhere. Buyers call there to buy or look at seed at irregular intervals. There are not very many callers that way, possibly an average per year of some dozen or so would call that way. The great mass of business done by Rodgers in the way of purchases and sales is done by either correspondence or by meeting the parties on the Board of Trade, or outside the building. I was the book-keeper and re-

ceived the slips that have been referred to in evidence. Have
565 seen them. Upon receiving those as book-keeper I checked
them off and entered them in the storage book. Received
from day to day this kind of slips. The book handed me marked
"Storage" is the book I referred to as the storage book. It was
kept by me from the time I was book-keeper there for Rodgers.
Those entries are in my handwriting. I made them from the
storage slips that you have there. A portion of the entries were
made from prior entries; this same book; some memoranda not
contained in other books. The entries of work in that book were
entered up by me from January 5, 1901. That book contains
566 the entries showing the section and floor on which the storage
of lots are placed. It gives the dates, etc., taken from this
memoranda. On page 24 of this book I find an entry made from
Black Exhibit No. 6.

Q. Now, can you state from your book there what lot this replacement, so-called, took the place of? If so, I wish you would turn to it.

(Objected to as not a book of original entries, and on the ground that the witness does not know that the entries are true and just; sustained.)

570 WITNESS (continuing): I could not say whether Rand had knowledge of the fact of this substitution of seed of which I have testified. I know nothing about whether any representative of the storage people had such knowledge; never
571 talked with any of them about it.

Cross-Examination by Mr. Elsdon.

My work was mainly in the office; was in there all the time except when I would go down-town to the bank. Went down to the bank sometimes with bills of lading. Had something to do with getting out the warrants at the office of the Storage Company. Was away from the building, as a rule, when down-town two or three hours. All the rest of the time worked in the office as book-keeper. Had something to do once in a while while I was there with shipping the seed out or weighing it in. Would help at such times; perhaps, say, ten or twelve times during my
572 being there, from January 5th to May 10th. Would not undertake to say just the number of times Rand was there while I was working there. He could get into the building and go upstairs while I was in the office and I know nothing about it. I said that when a car was released the tags were removed. I cannot tell who it was that removed the tags; had nothing to do with it.

Black would sometimes bring me the tag, sometimes Rand, whoever had it. I have no knowledge at all of the replacement; would not know anything about a replacement until a slip is laying
573 on my desk. The slip was all I knew about it. The tags came in to me after they were taken off the goods. I would sign the release. Rand would take it, and I kept a copy. My custom was to destroy those tags. Used to tear them up myself. I said that Rand asked me once if I still had the tags where the goods had been shipped out prior to that; I told him I had them. Could not say how long it was after the goods had left the
574 building. So far as the actual moving of the goods is concerned I could not give you one iota of information; it is all hearsay. I know nothing about the goods; did not even know that they had left the section at that time. I said that in one instance I know the tag was on my desk before the release was brought back to me. Don't remember who it was left the tag on in that case on my desk, or whether it was handed to me personally by some one, or whether it was left on my desk when I was out. I remember it was on my desk. It might have been Rand who left it. In that case I received the release myself; Rand
575 handed it to me. I got the data for filling out the tag marked "Rand Exhibit 23" from the storage book. That was given a lot number. It was originally 65, I suppose. Think I took the card from the top of the pile and that happened to be the number. Everything up to that number had been used prior to that. And I also had quite a number of higher numbers than that that were unfilled; they were simply blanks and I made this up from that book. My recollection is as to the date of May 10th, that the whole
576 thing occurred the last day, so far as I remember. It was after the filing of the petition in bankruptcy. The custodian of the receiver was there at that time. Am positive the conversation occurred with Rand in reference to that ticket. He asked me to make it out, not to put it on; I never put a card on a pile anywhere. As far as I remember one of the cards was missing on the pile, and we went up to the office together, and Rand asked me to make him a card to put on the pile, and I made out this card for him to put up. That is my best recollection of it. That was the substitution of one card that was lost. I inked over the 5 in the printed
577 figures 65 possibly to make them both appear as written. Simply a matter of look and appearance compared with one printed figure and one written figure. I think Rand was opposite me when I filled it out, to the best of my recollection. I said
578 I wrote this from the memorandum in the book. This was after the bankruptcy petition, and (reading from the book) "February 23d, National Storage Company, No. 54, basement F.4, 250 bags of timothy seed, First National Bank for collateral."

FRANK E. WINANS, sworn on behalf of the receiver, examined by Mr. McNab, testified as follows:

579 Am in the grain and seed commission business. Know the bankrupt. Went out to the warehouse of Rodgers on May 8th. Had sent my young man from the office several times to get weight of some timothy seed that I had sold Rodgers. Became a little impatient about it, and there was murmuring around 'Change about Rodgers not being around about business, and I said I would see about that thing personally; so I went over to the office about half-past twelve, and they told me I would have to see the Chicago Title & Trust Company. Then I went down to Gregory, Poppenhusen & McNab's and saw McNab, and we went out together.

580 When we arrived at the warehouse saw Bard, the custodian. I asked him to locate me two lots of seed; he took me to where the seed was. The first lot I found very readily; eleven bags of seed assigned to me from Olds, Iowa. My name was tagged on every bag. We left it where it lay. That was on the sixth floor, I think, in front of the elevator. There were no tags on those eleven bags; there were tags with my name on them, but no storage tags on them. I didn't hold storage certificates. The other

581 shipment of 225 bags we found on the third floor, Division 6. There were no storage tags whatever on those bags. Could not tell at that time whether they were my bags or not, but could tell that they had been recently put there. I went back to the office, and afterwards several of us went up there together, and I looked up the correspondence with my man, and the bags have a distinguishing mark on them consisting of the letter "O." That letter O was on those bags in Section D.6, to which place Bard took

582 me. I didn't see anything, blue signs or otherwise, in Section D.6 other than my storage tags east of my seed, I should say twelve or fifteen feet, maybe. Went out again to the warehouse within a week, at the time that all the parties went out under the court's order. Visited D.6 again. I found a storage tag on that pile of seed claimed to be in there for the National Storage Company as collateral, as I understood it, for the First National Bank of Chicago, as being in there on the 31st day of August, 1900. Am willing to swear that that storage tag is not there. Am not in the habit of giving Rodgers or anybody else an order for any of my property. I had my own teamster and I give him the order to deliver that property, subject to my order, until I got

583 my release from him on April 26th, and to the best of my knowledge it was in there on April 27th, 1901.

Cross-Examination by Mr. Elsdon.

Q. What do you know yourself about the time when the seed got there?

A. Well, I don't know anything absolutely, but my teamster said that he took it there not later than the following day, possibly that afternoon.

(Motion to strike out the witness' evidence as hearsay; overruled.)

WITNESS (continuing): It could not have got there after the 28th; it would be a physical impossibility. I first saw the *225* bags myself on April *26*th. I will tell you what I mean by
584 that. I saw the samples that came from those bags on April *26*th, when I negotiated with Rodgers for the sale of them; did not see the bags themselves with the seed in them. I know from my correspondent's letter of advice of shipment what marks were on them at the time they were sold. Don't know of my own personal knowledge what marks were on those bags at the time I sold them. The first time I ever saw the seed in the bags was the day I went up there, May 8th. It was *222* bags really. He asked me about *225* bags, and I replied *225*. I have got the orig-
585 inal bill of lading for *222*. I identified those by the letter O. You can see each bag there; it is in a pile. I saw the letter O on some of the bags, and that is why I think it was my property. Bard took me to the property that I say was mine. He identified the property as mine from information from a man in the office, and the man in the office got his information from a book. I know where the book got the information—on these original papers
586 here. That is all I know about those being my goods. I went through the entire building. My goods were not all through the building; they were on two floors, the third and the sixth, I think, but would not swear. They are right there now, and could be identified. In the first place, I went through in a sort of a desultory way to see if I could locate my own seed, and then I asked for information. Did not have one of the people with me, following through, when I first went there. Didn't have any warehouse receipts for the seed. I had sold Rodgers the goods on 'change, and my teamster had taken them over. He had not paid me for them. I had not even gotten the weights from him.
587 He didn't pay me for them, so I went over to investigate it. I sent my young man over there almost every day since I sold him the goods on 'change. I didn't see any tag on those goods. Am prepared to state without reservation that I looked for a
588 tag and could not find one.

JOSEPH L. MCNAB, sworn on behalf of the petitioner, Frank Winans, testified as follows:

I am an attorney at law Went out to the warehouse of Alexander Rodgers on May 8th with Frank E. Winans. Went through the warehouse, I think, on all floors. That was the day the bankruptcy petition was filed. Got there about two o'clock P. M. We located these eleven bags of Winans' on the sixth floor, right in front of the elevator. Had a conversation with Bard, the custodian. Bard and Vaas were in the premises at the time, and
589 Vaas gave Bard the directions by which we located the 225 bags in D, 6, on the third floor. I looked at those bags and saw no tag on them. I walked all through the premises; saw one blue sign on the fifth floor; that is all.

Cross-Examination by Mr. Heckman.

That was all the special tags I saw. Didn't look for blue signs. We walked all through. Saw only one blue sign. I didn't say I looked for signs, but did look for tags on those bags in Section D, 6, on the third floor. The building is narrow and runs
590 lengthwise towards the electric building. I think the section faced east. Have not been in that locality much. Those big board signs up there, Section 6, D, faced east towards the lake—towards the east side of the building. The stairway comes up away over what I would call the south-east side of the building, and the elevator is away over in the other end, as I would call it, the north-east side of the building. In going from this stairway leading from the second floor to the third, to get to Section 6, Division D, you would go over towards the center of the space and then west a little ways, as I figure it. It turned around there.
591 Found no bins on the third floor. If you are walking towards the elevator in Section D, 6, you go to your right to the opposite end of the building; that is in the middle of the building. Section D, 6, is near the middle, but you go away from the elevator. I would say you go south-west. Section D, 6, faces east. I located the section by that big sign that Rodgers put up there. I say Rodgers put them up because he told me that he did when he laid out the building. Some more hearsay. I know those were Winans' goods because I was directed to them by the custodian and Vaas. That is all I know about them. There were no signs on them. I looked at all the outward surface we could see of them. Looked at the pile. Did not look to see whether the letter O was on each bag; Winans was examing for that. Didn't see Winans look at every

bag in that section. Was not there after May 8th. The petition in bankruptcy was filed in the morning about ten o'clock, and I was over there about half-past two, shortly after Bard arrived. The receiver got possession along between twelve and one o'clock, and I was there about an hour afterwards.

593 Stipulation between the parties that there was an order of adjudication adjudging Alexander Rodgers a bankrupt on the 10th day of May, 1901, and that a voluntary petition in bankruptcy was filed by the bankrupt on May 8th, 10 A. M.

Further admitted and stipulated that the schedules herein show substantially as follows: Schedule A 1, an indebtedness to clerks and laborers for $27.01; Schedule A 2, an indebtedness to the First National Bank of Chicago and to H. W. Rogers & Bro., aggregating $18,312.50; Schedule A 3, an indebtedness to twenty different creditors in the total amount of $45,563.18.

Further admitted, for the purpose of this suit, that Aleaxnder Rodgers is indebted to unsecured creditors to a considerable amount and has creditors other than the First National Bank of Chicago and H. W. Rogers & Bro.

June 21, 1901.

THOMAS A. BLACK, recalled for further cross-examination, by Mr. Elsdon, testified as follows:

594 My recollection is that I testified that the goods in Division D, Section 6, were replaced on May 1st last. When that replacement occurred there was a tag on the goods taken out, and that was put back when the goods were replaced and new ones put in. The card shown me, marked "Rand Exhibit 1," looks like the card. Last saw the goods up there in the warehouse May 10th. Couldn't say without I look at that particular card whether I saw it on May 10th on the goods in Division D, Section 6. When we went over the goods there at the time the inventory was made, I think the cards were on all the Storage Warehouse Company's

595 goods. I was through the warehouse on May 8th, the day the receiver was appointed, with Bard, I believe. Bard said he wanted to go through the warehouse, and I took him through. I didn't examine the tags on that day; that was May 8th, in the neighborhood of one o'clock. Was there when Winans called with McNab on that day. Did not go with him to hunt up what he claimed as his goods. To the best of my knowledge, the card marked Rand Exhibit 1 was on the goods in Division D when I went through there with the receiver on May 8th.

Examination by Mr. Paden.

596 I have no particular recollection as to whether that card was in Division D, Section 6, not that specific card; I know the tags were on the piles; am positive of that; did not examine the pile; I read the tag. I read each particular tag when I went over with the receiver's custodian for the purpose of making up the inventory May 8th. There were 225 bags in that pile on the
597 day we took the inventory. I said that on the 10th I went there and examined every tag, and know it was there on the 8th to the best of my knowledge. I said to the best of my knowledge I believed the tag was on there on the 8th. I think it was on there. I didn't look at every tag that was on the third floor.
598 Didn't have any particular business on the third floor on the 8th, to my knowledge. The last time before the 8th when I had positive knowledge of having seen that tag was about May 1st, when we replaced that card. Don't know just the exact day, about May 1st. I mean that was a case where the goods were substituted. He had taken out the original goods and brought in other goods, and at that time the card was taken off while it was being removed and put back. That was about the 1st of May. Don't think I had occasion to inspect or see that tag between the 1st of May and the 8th of May. I know it was there on the 8th and on the 10th. Any of the employes had access to the building be-
599 tween the 1st and the 8th, but they never interfered with any tags that I know of. The representatives of the Storage Company also had access. Could not say whether any of them were there between the 1st and that 8th. I made no particular examination on the 8th; just walked around the building, round the aisles. Didn't notice at that time particularly the tags of the National Storage Company on the different piles; I saw some there. Did not say anything to Bard about the National Storage Company that day, to my knowledge.

Q. Did you make such an examination on that day as
600 would have disclosed that that tag was missing, if it had not been on the pile?

(Objected to; overruled.)

A. No, sir.

Re-direct Examination by Mr. Wyeth.

Referring to Exhibit 15, handed me, that refers to the transaction of May 1st. Where the bags were replaced in this section, Division D. I made a memorandum as to the number of bags placed there. There were 249 bags placed there May 1st; that is, in Division D, Section 6. Some of the bags were removed
601 afterwards, leaving 225. Don't know the date of such removal. I think it was before the receiver went into possession; could not be positive, though, as to the time. I know we took twenty-four bags out of the pile.

Re-cross Examination by Mr. Elsdon.

Those were taken out on the order of Mr. Rand, if I remember right. They were piled right on the same floor, in another section. There was no card of the National Storage Company put on them. The National Storage Company did not own it. My best recollection is that it was by the order of Rand; couldn't be positive; don't recall the date. I saw this card, "Rand Exhibit 1," on there after the twenty-four bags were taken out. I put it on there myself.

GEORGE R. BARD, recalled on behalf of the National Storage Company, examined by Mr. Elsdon, testified as follows:

607 I remember going through the premises with Mr. Winans on May 8th, along in the afternoon. I know we found some goods, and after looking over the bags, and tracing it, he claimed they belonged to him; do not know in fact whether they belonged to him; not that particular lot. There were 225 bags in the lot, if I remember right; am not sure just the number; it was about that number. Could not say positively, but I think there was a National Storage Company tag on the goods at that time. There were two piles there, and I know on the piles to the west where the pass-
602 ageway is there was no card there. There might have been on the pile against that to the east, and there was a passageway to the east; that would be four rows of bags. Couldn't tell exactly where that card was. I think there was a post in front of one of the piles at that time. To the best of my recollection, one of the piles of goods was piled up against the post. I presume Winans claimed the whole—so many bags in that section. He examined the west part because he could not go to the east because there was

no passageway between them, and I think the tag or card was on the east tier of goods.

Cross-Examination by Mr. Paden.

I saw the tag, but I could not remember positively whether 604 it was on that particular lot of bags, because there were four rows. There were two lots in the section, or in the next section; don't know whether there was a division of a section or not, but I could not say positively whether it was. I went with Winans twice, the first time on the 8th, and when he came there afterwards to make further investigation. Could not say positively which time it was that I am sure the tag was there. I didn't say that I was positive that at one time I went with him there was a tag on that particular lot, but immediately adjoining it, if not on it. Did not say positively it was on that lot; I know there was a tag there in the immediate vicinity, but whether it was on that particular lot of bags or not I could not say positively, because I didn't pay particular attention. Don't know whether it was this tag that is referred to or some other tag. Remember it was a Storage Company tag.

Re-direct Examination by Mr. Heckman.

Will say tag last mentioned was Rand Exhibit 1. Could 605 not say whether it was the first or second time, or both, that I saw the tag there, but the first time that Winans was there, anyway, and I presume that was the 8th, if I remember correctly. We found eleven bags with his name on them on one of the floors above the office floor; could not say exactly which floor it was. Don't know whether we went round that afternoon and found the rest or not; there was no way of tracing it without that book 606 there. McNab was there at the time I refer to; think he was there both times. Could not say that we found just 225 bags. The only thing I am absolutely positive about is finding eleven bags with his name on. Could not say that we found the other the same day or not.

E. C. RAND, recalled on behalf of the National Storage Company, examined by Mr. Elsdon, testified as follows:

The goods in Division D, Section 6, are piled in two rows. The west row is just back of the post. Should say that there is about a third of a bag abutting against the post in front of the section. I testified that I removed all of these tags that were
607 up there for this hearing. Looking at Rand Exhibit 1, that was put on up there by me on August 31, 1900; could not be sure of the date when I removed it. It was since the beginning of the hearing here before the referee, and was brought down for the purpose of having them put in evidence. I last saw the tag on there prior to the time that I removed it on the morning of May 10th. I should say it was about May 2d that I last saw it prior to May 10th, a week before the petition in bankruptcy was filed. I was there on the premises between the 7th and the 10th of May. Could
608 not be positive that I saw the tag. Didn't make any examination during that interval as to whether the tags were there. The tag was placed on the east row in that section and division. Should say the card was about two to three feet east from the post. The post is, of course, the front of the pile. I think it is an eight-inch post. The piles are on a line to the north side of the post. Ordinarily there was a cross-pile laid in front of the two rows of bags. There is no cross-pile in front of this lot; it was a short car, 200 to 225 bags; most of the other was 250, so that there was no cross-pile to attach this card to. I never removed the card after having put it on there originally, as I stated, prior to the time when I removed it since the commencement of this hearing. There was no time in that interval when I saw that the goods in
609 that section were without a tag. I didn't request or tell Black to take twenty-four bags out of that section in which there were 249 originally, nor did I direct him to do so. Did not order or direct any one to take out the twenty-four bags that were in there. Didn't know anything about their removal; didn't know that there were twenty-four bags over. There was not on August 31st any more than the regular amount. I inspected about the second of May. There were not twenty-four additional bags in there at that time. I never at any time when I inspected these goods found any more than the 225 bags of timothy in that section. Negotiated the making of this lease with Rodgers.

611 Q. When you made the lease up there from Rodgers to your company, who was in the possession of and occupying the portions of the floor not covered by your lease?

(Objected to; overruled.)

A. Apparently, Alexander Rodgers.

(Objected to; sustained.)

612 Q. What do you mean by "apparently"?

(Objection; sustained.)

Q. Was any one besides Rodgers using any portion of the premises not covered by your lease at the time that you made the lease, if you know?

(Objected to; overruled.)

A. No; I could not tell.

Q. What use, if any, was Rodgers making of the portion of the premises not used by the electric company and not included in the lease to the Storage Company at the time you made your lease?

REFEREE: He has already testified to that.

(Objected to; sustained.)

614 WITNESS (continuing): I remember a conversation I had
615 with Rodgers with reference to Rodgers' removal of seed for the purpose of cleaning them. I heard Rodgers' testimony, heard him testify with reference to a conversation had at one time while we were doing business up there at the warehouse. I didn't state in that conversation, in substance, that they might remove seed for the purpose of cleaning it and put it back again. He said that during the busy season he did not have time to clean the grain before he put it in store, that is, before it was in shape for the market, and that he would like to put it in store and then take it out and clean it. I said to him that the best way for him
616 would be to put in another lot, and take this out until it was cleaned, and then put the other lot back. I had a conversation with him with reference to getting the release of property that was to be cleaned. That is the same thing that I testified to just now; I meant a release. Of course, that means taking out one lot.

Q. What was said in this conversation—give the full conversation?

(Objected to; overruled.)

617 A. Rodgers, sometime in the fall, I think, in the latter part of September or October, said that during the busy season he didn't have time to clean the seed before it came in our place, and that he didn't want to put it in store without cleaning it, and he wanted to take that seed out of the store and clean it and put it back in its place in the same section and division and put the same tag back on it. I told him that the way for him to do would be to release this lot of seed that he wanted to clean and put in another

lot prior to that and have a warrant issued to take its place; then when this seed was cleaned, put it back and have a warrant issued, and have a release for the lot that he had put in to take the place of the cleaned seed.

WITNESS (continuing): At that conversation I did not say in substance to Rodgers that all our company cared about was that there should be seed there to answer for the warrant. I heard Rodgers' testimony on that point. I didn't use any such statement as that at all, and made no such reply as that. Black, who testified in this case, never to my knowledge removed any of the tags from the property covered by warehouse receipt. Black never gave me at any time any tags of the National Storage Company that he himself had removed from goods. I never knew of Black's replacing tags after they had been taken off and goods had been substituted. I never knew of his taking them off. Never knew of the removal of goods there and the replacing of others in their place where no release had been obtained and no warrant issued. Do not
620 know of Black's ever tearing up any National Storage Company tags that had been removed from goods at any time. Never had any conversation with Black about tearing up cards where goods had been previously shipped out. Black never talked to me with reference to tearing up a card at any time. Never
621 asked Vaas at any time if he had a tag for goods that had already been shipped out at the time I talked with him. I never at any time had any conversation with Vaas in reference to goods that had already been shipped out and the tags removed by some one beside myself. Never at any time had any conversation with Vaas when I asked him to make out a new tag for the one that had been lost, as has been testified to in this case. At the time this petition in bankruptcy was filed there were storage charges due from Rodgers to the National Storage Company upon the
622 property in the warehouse. They have not been paid since then, to my knowledge.

Cross-Examination by Mr. Wyeth.

623 In reference to these storage charges, I think the contract was made for $7.50 on $10,000, or 75 cents per thousand. The valuation of the property was $10,000; 75 cents per month per thousand in excess of $10,000, in accordance with the terms of the contract that has been introduced in evidence.

WALLACE HECKMAN, called on behalf of the National Storage Company, testified as follows:

I heard Mr. Wilson's testimony, the attorney for the receiver, in reference to a conversation that he had with me after the receiver was appointed in this case. I didn't in that conversation state to Wilson, in substance, that the National Storage Company had this property in the warehouse of Rodgers under lock and key, or anything to that effect. I merely undertook to state to Wilson the method of our doing business, not the situation here. I did not know at that time the situation as to this particular property.

Cross-Examination by Mr. Wyeth.

I didn't say to Mr. Wilson that I didn't know the situation of this property.

Which was all of the evidence submitted by any of the parties hereto upon the original reference to the referee.

1 TESTIMONY HEARD BEFORE REFEREE EASTMAN UPON THE SECOND REFERENCE.

October 21, 1901.

E. J. BLOSSOM, sworn on behalf of the petitioner, First National Bank, examined by Mr. Peckham, testified as follows:

2 Have had charge for ten or twelve years of the discount department and collateral of the First National Bank of Chicago. Know the bankrupt Rodgers. He is a debtor of the First National Bank. The First National Bank of Chicago is the holder of the following promissory notes: One purporting to be signed by Rodgers for $2,300, dated November 1, 1900, marked "Exhibit A. Hoge" in this suit; also one for $3,500, dated December 24, 1900, marked "Exhibit B. Hoge"; also one for $2,250, dated January 5, 1901, marked "Exhibit C. Hoge"; also one for $1,200, dated March 14, 1901, marked "Exhibit D. Hoge"; also one for $1,200, dated February 27, 1901, marked "Exhibit E. Hoge"; and also one for $4,500, dated January 21, 1901, marked "Exhibit F. Hoge," all payable on demand. I have computed the interest due on those notes at the present time. The amount of interest
3 due to date is $294.59, and principal $9,854.15. In reaching this computation I take account of a payment made on this indebtedness since May 8, 1901, amounting to $2,099.03; that is the only payment that has been made since that date. That payment was made from the sale of seed, a portion of the collateral. The bank held warehouse receipts as collateral as evidence of that fact. One of the warehouse receipts was No. 6705 of the Chicago Dock Company for 239 bags of timothy seed, and another was the warehouse receipt of the Sibley Warehouse Company, No. 6402, for 236 bags of timothy seed. The amount realized to the bank on the sale of that seed was $2,099.03. It was sold to the Albert
4 Dickinson Company. The bank received from the Albert Dickinson Company an account of those sales. I have copies of these documents.

Documents referred to, and which had been marked Exhibits 1 and 2 for identification, introduced in evidence, as follows:

EXHIBIT 2.

THE ALBERT DICKINSON CO.,
Seed Merchants,
Offices, West Taylor St. and the River.
CHICAGO, May 24, 1901.

BOUGHT OF C. A. HEATH,
A/C WHOM IT MAY CONCERN

Mark	Bags	Seed	Gross	Tare	Net	Price	
R NL	239	Timothy	30528	239	30289	3.45	1044.97
		Less commission					7.84
							1037.13
		Less storage 2 Mos at 2 & 1½					8.37
							1028.76
		239 at 14					33.46
							1062.22

EXHIBIT 1.

THE ALBERT DICKINSON CO.,
Seed Merchants,
Offices, West Taylor St. and the River.
CHICAGO, May 24, 1901.

BOUGHT OF C. A. HEATH,
A/C WHOM IT MAY CONCERN

Mark	Bags	Seed	Gross	Tare	Net	Price	
T66745	236	Timothy	30146	236	29910	3.45	1031.89
		Less commission					7.73
							1024.16
		Less storage 4 mos. at 1½					14.16
							1010.00
		136 at 13			17.68		
		100 at 14			14.00		
					31.68		
		3 cuts			.15		31.53
							1041.53

Cartage	4.72
	1036.81

5 WITNESS (continuing): Referring to the Rodgers note, concerning which I testified, for $2,300, dated November 1, 1900, and marked "Exhibit A. Hoge," there is an endorsement on that note as follows: "Paid May 7, 1901, $1,700," in my handwriting. I can explain that endorsement: A day or two before May 7th Rodgers withdrew from the bank on a trust receipt warehouse receipts numbers 8491 and 9155 of the National Storage Company, each for 250 bags of timothy seed. The bank had received them as collateral from Rodgers. On May 7th he gave me his check on the bank for $2,000, which paid the advance of the bank on these two warehouse receipts, and in return for his
6 check I handed him back his trust receipt. I have a form of those trust receipts with me. It reads as follows: "Received in trust from the First National Bank of Chicago (blank for description of the warehouse receipt as I have described it), and I hereby undertake to hold the said property on account of the said bank and subject to its order, for the purpose of being sold or otherwise dealt with as the said bank may direct; and when sold to pay in net proceeds to said bank. I hereby acknowledge myself bailee of said property of said bank." The $2,000 payment was applied, $1,700 on the note of $2,300, dated November 1, 1900, and $300 on a $6,000 note paying the $6,000 in full, that being a note on which there was a balance of $300 due, and on which there had been previous endorsements. That is not among
7 those which I have handled this morning. Rodgers had often done this business in this way with the bank before. There is an endorsement in my handwriting on the note handed me for $3,500, dated December 24, 1900, marked "Exhibit B. Hoge." I can explain the endorsement. The balance to the credit of
8 Rodgers' account on the books of the bank was $1,296.82. I mean his account as a depositor in the bank, for funds which were subject to his check at any time. We appropriated this balance and applied it on his indebtedness by memorandum check charged to his account. I have the document (producing same).

Document referred to introduced in evidence as "Exhibit 3 Blossom," as follows:

"CHICAGO, Ill., May 8, 1901.

First National Bank. Memorandum check for balance of account applied on demand loan $1,296.82. Charge Alexander Rodgers, by E. J. B."

Mr. WYETH: On behalf of the trustee, objection is made to the right of the bank to thus apply credit for the amount of the balance in the bank. I suppose the question really arises on the evidence.

Cross-Examination by Mr. Wyeth.

9 I mean by taking into account the proceeds of sale of the two warehouse receipts in the Chicago Dock Company and the Sibley Warehouse Company that there is left on these notes this balance of $9,854.14, and the interest I have spoken of; $2,099.03 was credited to an account of Rodgers which we styled collateral account, which amount would go to reduce Rodgers' general indebtedness. That collateral account was a credit on the books of the bank from the proceeds of the sale of the seed I spoke of. The bank held certain notes of Rodgers', but this amount was not
10 applied on the notes, but the amount, together with the interest, has been computed in the figures that I have given, leaving a balance of $9,854.15. I don't understand that any part of the warrants were ever pledged for any specific indebtedness; the entire amount of collateral held covered the entire debt. The National Storage Company warrants, Numbers 8498 and 8499, each for 250 bags of timothy seed, were received at the time the note of November 1, 1900, was accepted by the bank. I don't know who attached that memorandum to the note. It is part of my duty to look over the collateral at the time it is received. Those particular warrants were received in this case with the note of November 1, 1900. It was warrant Number 8491 and not
11 8499 that was delivered on May 7th. Warrant 8498 had not, so far as I know, been held by the bank prior to the date of that note of November or prior to its use with that note. Have no memoranda with me that would show whether it was held by the bank before. There are undoubtedly records kept in the bank showing the warrants held before in connection with Rodgers' matter. Am unable to state how long the bank continued to hold Warrant 8498. There are memoranda in the bank that would show when 8498 was delivered up by the bank. Could not now give any information as to how long we held Warrant 8499, and when it was delivered up, if it was delivered up. Could not
12 of my own knowledge state what warrants were received with the note of December 24, 1900, at the time it was taken to the bank, aside from the memorandum attached here. That says there were three warrants, Nos. 9118, 9119 and 9120. Apparently they were received at the time the note was received. Could not of my own knowledge now state how long the bank continued to

hold Warrants 9119 and 9120. I think there are memoranda in the bank that would show that fact, when they were received, as well as 9118.

It is a fact that the bank held the warrants of the National Storage Company received from Rodgers generally for the indebtedness of Rodgers and not as applied to particular notes held by the bank. That was the case in reference to other notes held by the bank both before and after the date of these two notes. When payments were made by Rodgers to the bank on account of his notes, it was generally by check to the bank, and the
13 custom was to apply these payments on the older notes until they were paid up. Back of the note of $6,000 that I have referred to, dated October 23, 1900, the bank held other notes of Rodgers' from say August, 1900, and during that period, from the last of August, 1900, up to May 7th this year, when payments were made by Rodgers, it was the custom to apply them on the oldest notes. The trust receipt that I have referred to in May was executed by Rodgers. Cannot state at this time when warrant No. 8491 was received by the bank. Warrants 8491 and 9155 were not attached to any notes at the time of Rodgers' taking them, but were held by the bank in a general way as security for any of his indebtedness represented by these notes. The National Stor-
14 age Company warrants were never held specially in connection with the note of January 5, 1901, for $2,250 alone, but were held in general as I have testified. As to these other notes, Exhibits D, E and F, Hoge, the circumstances are the same as to those notes about having the warrants held in general rather
15 than particular warrants for particular notes.

Witness agrees to hand in a statement showing storage warrants held and received and delivered up during time from taking note of November 1, 1900.

Each note of itself states that the warrants were to be held generally for the notes of Rodgers. There are no memoranda that I know of outside of that contained in the body of the note. Could not fix the date at which Rodgers began to use the National Storage Company warrants with our bank. There was not, to my knowledge, any personal statement or agreement between the bank and Rodgers at the time Rodgers began to use the Storage Company warrants in connection with his business in our bank
16 with regard to how the warrants should be taken. I don't know that there was any such arrangement made on behalf of the bank. I say I don't know of my own knowledge of any agreement, either verbal or written, with Rodgers, other than that shown in the notes as to how the so-called collateral should be used and held. Rodgers had prior to the time of the using of the National

Storage Company warrants used other warrants in the same manner with our bank, extending over into the period of the using of the National Storage warrants. There was no arrangement, to my knowledge, between Rodgers and the bank as to the manner in which any such other warrants were to be held or used in connection with his indebtedness or notes to the bank. It is not cus-
17 tomary to make any arrangement other than what appears on the notes themselves. Could not say when Rodgers first began his business with the bank. Could not say who made the arrangements on behalf of the bank with Rodgers as to his becoming a depositor there; probably Mr. Hoge. Rodgers' business with the bank extends over a period of a good many years, and probably it would be difficult for any one to say who made the original agreement with him. When Rodgers went into business for himself there would be some one in the bank that might make arrangements with him with regard to advancing him money on the securities that he would bring in. Could not say who that was, but presume likely it was Hoge, assistant cashier.

I will look up my memorandum with regard to the warrants
18 that I have been asked about, extending over the period of these notes. I have no record now of the payments that have been received by the bank from Rodgers since January 1st last, aside from those testified to by me this morning. Rodgers' account would show the payments made by him or on his behalf for which credit is given on his indebtedness from January 1, 1901. I will produce and bring in, to be used with my further testimony, the statement of account of Rodgers as to his indebtedness and the credits that have been made thereon since January 1, 1901.

I said that on May 7th there was a credit of $300 paid on
19 the $6,000 note. Payments aggregating $5,700 were made on that $6,000 note at various dates and in various amounts. I know this of my own knowledge. Am not at present able to state the dates and amounts of the various payments. I have minutes in the books of the bank that would show those payments
20 and that the payments were applied on those notes.

Re-direct Examination.

21 I spoke of a collateral account. It is simply an account which the bank opens on its own books for convenience in book-keeping. Its full title is "Collateral Account, Alexander Rodgers." I said that no part of this $2,099.03 has been endorsed on any of these notes now here, but the amount has been credited in this collateral account. I allowed in my computation interest to Rodgers on the $2,099.03 from the date of the credit to that

account. I deposited the $2,099.03 to the credit of that account the same day I received it, so that I allowed Rodgers interest in my computations on that amount from the time the bank received the money.

Offered by Mr. Wyeth, on behalf of trustee, statement furnished by witness E. J. Blossom, and marked E. J. Blossom Exhibit No. 1, of October 28, 1901, as follows:

E. J. BLOSSOM EXHIBIT NO. 1, OF OCTOBER 28, 1901.

Statement of National Storage Company warrants received and held by the First National Bank of Chicago as reported by said bank, in connection with indebtedness of Alexander Rodgers to said bank existing and unpaid January 1, 1901, and thereafter, together with the dates said warrants were received by said bank and the dates said warrants were delivered up, so far as same were delivered up by said bank:

DATE RECEIVED.	WARRANT NO.	DATE DELIVERED UP.
1900. Sept. 1.	8406.	
" 1.	8408.	
" 11.	8437.	
Oct. 23.	8489.	
" 23	8491.	May 7, 1901.
Nov. 1.	8498.	Nov. 26, 1900.
" 1.	8499.	Dec. 12, "
" 9.	8897.	Apr. 11, 1901.
" 10.	8908.	Nov. 15, 1900.
" 15.	8928.	
" 24.	8992.	Dec. 12, 1900.
" 25.	8996.	Mar. 27, 1901.
Dec. 24.	9120.	May 1, 1901.
" 24.	9119.	Mar. 9, "
" 24.	9118.	
1901. Jan. 5.	9154.	May 2, "
" 5.	9155.	May 7, "
" 21.	9193.	Feb. 23, "
" 21.	9196.	May 1, "
" 21.	9197.	Mar. 11, "
" 21.	9194.	May 4, "
" 21.	9195.	
Feb. 23.	9244.	
" 27.	9246.	

Date Received.	Warrant. No.	Date Delivered Up.
Mar. 14.	9338.	Apr. 11, 1901.
" 29.	9348.	
May 1.	9427.	
" 1.	9426.	
" 1.	9425.	

October 28, 1901.

Thomas A. Black, sworn on behalf of the trustee, examined by Mr. Wyeth testified as follows:

I testified on a former reference in this case in regard to certain slips of storage and replacement of lots of seed. The storage slip handed me, dated March 26, 1901, was made by me. I
24 made that slip March 26, 1901. The car was weighed up and put on the fifth floor, Division B, Section 14, to replace a previous lot of timothy seed. The items and statements in the slip are the original entries in connection with the weighing
25 in of this seed. I think they are true and correct, except an error in figuring, or something of that kind. It is the regular items made out by me in connection with the placing in of that lot of seed, and this slip is handed over. It is made under the circumstances I have just mentioned. When I am through with it it is given to the book-keeper for the purpose of entering into the books of account.

(Paper offered in evidence as "Exhibit No. 16" of October 28, 1901.)

(Objected to by Mr. Elsdon as reopening their original case and not material to the issues now being tried with the referee; objection by Mr. Kerr as immaterial, incompetent and improper.)

Q. I will ask you one thing more. What do the letters R. S. I., "R" being in a circle, in the upper left-hand corner of that slip, refer to and mean?

(Objection by Mr. Kerr and Mr. Heckman.)

Mr. Elsdon: All this evidence goes in subject to our
26 formal objection; I don't suppose it is necessary to object to every question on that same ground.

Mr. Wyeth: No, I suppose not.

Mr. Heckman: We want some understanding about that.

Mr. Elsdon: We object in a general way to the introduc-

tion of this slip, on the ground it is opening up their original case, and it is incompetent on the issues now before the referee, and it is also incompetent, immaterial and irrelevant. I think that ought to be ruled on by the court.

Mr. PECKHAM: I join in that objection.

Mr. KERR: I make the further objection to this testimony, once for all, that it does not tend to prove any issue in this case.

A. The circle R. S. I. is a stock mark used by us and is marked on each blank of this lot of timothy seed. Of the 250 bags spoken of in that lot this mark was on each bag, made with a stencil. The words "Replace" and "R. R. L." and "R" being in a circle in the lower part of the slip mean that these 250 bags
27 were used to replace a former lot marked circle R. R. L. That is, the former bags in the former lot had R circle R. L. on them in the manner I have explained.

Paper introduced in evidence, marked "Black Exhibit 16," as follows:

BLACK EXHIBIT 16.

March Storage slip. Date—Mar. 26, 1901. From stock. Car No.
Bags—250. Kind—Timothy. T A B—weigher. R, circle, S. I.

31031
250

30781 Replace R, circle, R L

Fl. 5, Div. B, Sec. 14. Brand bags—A & A

WITNESS (continuing): The slip handed me, dated March 28, 1901, was made out by me in connection with placing in the lot of seed mentioned in that slip by me. It is correct, and made at the time of the transaction. The various marks on the slip have reference to the same subject-matter as the marks on bags and placed in the premises of Rodgers' where the same lot of seed was placed, that is true of the other slip I referred to. The words "Brand Bags A. & A." at the bottom of that slip mean that the seed were in American and Amoskeag bags, and on this prior
28 slip that I referred to the same words mean the same thing.

The last slip introduced in evidence as "Black Exhibit 17," as follows:

BLACK EXHIBIT 17.

Storage slip. Date—3/28/01. From—stock. Car No.
Bags—250. Kind—Timothy. R. circle, S K
32540
250

32290 Replace.
Fl. 5, Div. B. Sec. 14. Brand bags—A & A

(Objected to by Mr. Elsdon, Mr. Kerr and Mr. Peckham, for the same reason that the former slip was objected to.)

WITNESS (continuing): The slip shown me, dated April 18, 1901, was made under circumstances similar to the other slips I have testified to. It is a true statement of a matter of a replacement.

Q. What was the transaction that that slip refers to?

(Objected to by Mr. Elsdon, Mr. Kerr and Mr. Peckham, for the same reason that the last slip was objected to.)

A. It refers to 250 bags of timothy seed, marked circle
29 R. S. W., placed in the fifth floor, Division B, Section 14, to replace a previous lot.

Slip introduced in evidence, marked "Black Exhibit 18," as follows:

BLACK EXHIBIT 18.

Storage slip. Date—4/18/01. From stock. Car No.
Bags—250 Kind—Timothy. T A B—weigher. R. circle, S W
31263
250

31013 Replace.
5—B—14 Brand bags—Naomi.

(The introduction of the slip objected to by Messrs. Elsdon, Peckham and Kerr, as a reopening of the case and not material to the issues now being tried by the referee, and as immaterial, incompetent and improper.)

WITNESS (continuing): Division B was the fifth floor. The slip shown me, dated January 17, 1901, was made by me in connection with the replacement of grain. The items of date, mark-

ings and quantity of seed, and place where placed, are correct, and made by me at the time of the placing in of the seed.

(Objection by Mr. Heckman to the method of examination as leading.)

A. The transaction referred to in that memorandum related to 250 bags of timothy seed marked circle R. Q. T., and placed in the fifth floor, Division B, Section 29, on January 17, 1901.
30 I made the entries upon this slip at the time of the seed going into the store. There was weighing being done. The columns of figures in the slip refer to the weights of that particular lot of timothy seed, and make up the total amount of 252 bags, weighing 30,185 pounds.

Slip introduced in evidence, marked "Black Exhibit 19." as follows:

BLACK EXHIBIT 19.

Jan. Storage slip. Date—Jan. 17, 1901. From—stock. Car No.
Bags—252. Kind—Timothy. T A B—weigher. R, circle, Q T

30437
252

30185

Fl. 5, Div. B, Sec. 29. Brand bags—Harmony.

(Introduction objected to by Messrs. Elsdon, Kerr and Peckham, on the grounds heretofore mentioned, and also on the special ground that the substitution of seeds not known and acquiesced in by the holder of the warrant at the time is wholly immaterial.)

WITNESS (continuing): The five slips now handed me show that there were five different lots put in that same section, 5, B, 29, at different times; 250 bags of timothy seed put in on February 5th to replace a previous lot; 249 bags on March 13th to replace a previous lot; 250 bags on March 22nd to replace a previous lot; 250 bags on April 25th to replace a previous lot; 250 bags on May 4th to replace a previous lot. Those slips were made by me, and are true and correct, to my knowledge, as to the matters and things therein contained.

31 Five slips introduced in evidence, marked "Black Exhibits 20 to 24, both inclusive," as follows:

BLACK EXHIBIT 20.

Storage slip. Date—5/4/01. From—stock. Bags—250. Kind—Timothy.

28163
250

27913 Replace.

5—B—29.

BLACK EXHIBIT 21.

Storage slip. Date—4/25/01. From—stock. Car No. Bags—250. Kind—Timothy. R. circle, S Z

32935
250

32685 Replace.

5 B 29 Brand bags—A & A

BLACK EXHIBIT 22.

Storage slip. Date—3/22/01. From—stock. Car No. Bags—250. Kind—Timothy. T A B—weigher R. circle, S G.

30359
250

30109 Replace.

5 B 29 Brand bags—Naomi.

BLACK EXHIBIT 23.

Storage slip. Date—Mar. 13, 1901. From—stock. Car No. Bags—249. Kind—Timothy. T A B—weigher. R. circle, R Z

32206
249

31957 Replace.

5 B 29 Brand bags—Naomi. A & A 80, Msc. 11.

BLACK EXHIBIT 24.

Storage slip. Date—Feby. 5, 1901. From F. E. Winans.
Car No. 26681.
Bags—260. Kind—Timothy. Date rec'd 2/6/01.
T A B—weigher.

32218
260

32558 Replacing. R, circle, Q T
Fl. 5, Div. B, Sec. 29. Brand bags—Amer.

(Messrs. Elsdon, Peckham and Kerr object to the introduction of the slips on the same grounds given in the objection to the introduction of the others, and for the further reason that these relate to seed in a section not covered by any warrant at the time of the bankruptcy, and as immaterial and irrelevant. Mr. Elsdon also moves to strike out all the evidence of the witness with reference to the slips covering Division B.14 and 29, on the ground they do not relate to any warrants involved in these proceedings.)

32

WITNESS (continuing): The recapitulation of the slip handed me, dated January 23, 1901, was made by me. It was made in connection with the replacement of seed on the fifth floor, Division B, Section 5, at the time the car was replaced. That was January 23d. I mean by recapitulation the total amount of seed and the number of bags. The balance of the memorandum was made by Mr. Vaas.

33

(The slip was marked "Black Exhibit 25" for identification only.)

WITNESS (continuing): The slip handed me, dated January 24, 1901, was made by me in connection with the replacement of seed in Division B, Section 19. It is a correct statement, and the seed was placed on the fifth floor, Division B, Sections 17 and 19.

(Slip introduced in evidence, marked "Black Exhibit 26.")

(Objected to by Messrs. Elsdon, Kerr and Peckham, on the same grounds as the former ones were, and as not relating to any section in which there was any seed at the time of the bankruptcy.)

34

Said slip is as follows:

BLACK EXHIBIT 26.

Storage slip. 1/24/01. From—stock. Car No. B 29.
Bags—319. Kind—Buckwheat. Weigher—T A B.

38554
319

38235
1580

36655

5 B 17-19. Brand bags—Patched. New Cherokee, 143.

WITNESS (continuing): I don't remember whether the 319 bags were divided into two lots or not. The slip handed me, dated March 9, 1901, referring to B, 19, was made by me. It relates to 221 bags of buckwheat, weighing 29,404 pounds, placed on the fifth floor, Division B, Section 19, to replace a previous lot. The entries are true and correct.

(Objected to by Mr. Elsdon, and motion to strike out the answer of the witness for the reason that it does not relate in any way to any of the warrants now involved in this proceeding, and for the further reason that the evidence is incompetent, immaterial, irrelevant, and not admissible under the issues in the case.
35 Mr. Kerr and Mr. Peckham join in said objection and motion.)

The slip last referred to introduced in evidence as "Black Exhibit 27," as follows:

BLACK EXHIBIT 27.

Storage slip. Date—3/9/01. From—stock. Car No. B 25
Bags—221. Buckwheat.

29625
221

29404 Replacing B 29.
5 B 19. Weigher—T A B.

(The introduction objected to by Messrs. Elsdon, Kerr and Peckham, on the grounds heretofore mentioned.)

Q. I show you two slips, marked January 26, 1901, and March 18, 1901, and will ask you who made those, and when, and what they relate to (handing same to witness).

(Objected to by Messrs. Elsdon, Kerr and Peckham, for the same reason made in last objection.)

A. I made both of these. They refer to 250 bags of timothy seed, weighing 30,742 pounds, and placed on the third floor, Division D, Section 1, on January 26, 1901; and the other one 250 bags of timothy seed, weighing 30,688 pounds, placed on the third floor, Division D, Section 1, on March 18th. The slips are made by me in connection with the placing in of those lots and are true and correct.

36 Slips introduced in evidence, marked Black Exhibits 28 and 29, as follows:

BLACK EXHIBIT 28.

Jan. Storage slip. Date—Jan. 26, 1901. From—stock. Car No.
250 Bags—Timothy. T A B—weigher. R. circle, Q Z

30992
250

30742

Fl. 3, D. 1. Brand bags—Naomi.

BLACK EXHIBIT 29.

arch Storage slip. Date—Mar. 18, 1901. From—stock. Car No.
250 bags—Timothy. R, circle, S C.

30938
250

30688 Replace.

3, D, 1. Brand bags—A & A

(Objected to by Messrs. Elsdon, Kerr and Peckham, on the grounds heretofore mentioned.

Q. I show you three slips, and ask you whether or not you made those, and if so, when, and what they relate to?

(Objected to by Messrs. Elsdon, Kerr and Peckham, for the same reasons heretofore mentioned.)

A. These slips refer, that of January 15, 1901, to 250 bags of timothy seed, weighing 30,595 pounds, placed on the third floor, Division D, Section 5. On February 8th the 250 bags of timothy seed, weighing 30,679 pounds, and put in the third floor, Division D, Section 5, to replace a former lot. On April 20th, 250 bags of timothy, weighing 30,226 pounds, placed in the third floor,

Division D, Section 5, to replace a former lot. I made the slips at the time the seed was put into that section. The items of entries are true and correct.

The three slips introduced in evidence, marked Black Exhibits 30, 31 and 32, respectively, as follows:

BLACK EXHIBIT 30.

Storage slip. Date—4/20/01. From—stock. Car No.
Bags—250 Timothy. T A B—weigher. R, circle, S V.

30476
250

30226 Replace.
3. D. 5. Brand bags—A & A

BLACK EXHIBIT 31.

Storage slip. Date—Feb. 8, 1901. From—stock. Car No.
Bags—250 Timothy. R, circle, R G.

30929
250

30679 Replacing.
Fl. 3, Div. D, Sec. 5. Brand bags—Naomi.

BLACK EXHIBIT 32.

Storage slip. Date—Jan. 15, 1901. From—stock. Car No.
Bags—250 Timothy. T A B—weigher. R, circle, Q R.

30845
250

30595
Fl. 3, Div. D, Sec. 5. Brand bags—Amer. & Amos.

(Objected to by Messrs. Elsdon, Kerr and Peckham, on
37 the grounds heretofore mentioned.)

WITNESS (continuing): I made all but the four items of weights, four truck loads, on the slip dated March 5, 1901, also the footing, and was present at the transaction. The four truck loads are 759, 722, 720 and 700. That was made in connection with the replacement of seed. The items are true and correct so far as made by me.

Slip introduced in evidence, marked "Black Exhibit 33," as follows:

BLACK EXHIBIT 33.

Storage slip. Date—Mar. 5, 1901. From—stock. Car No.
R, circle, R W. Bags, 150 Timothy.
T A B—weigher. R, circle, R X 100 " "

18075	12336	12236
150	100	17925
17925	12236	30161

3, D, 11. Replace. Brand bags—A & A

(Objected to by Messrs. Elsdon, Kerr and Peckham, on the grounds heretofore mentioned.)

38 Stipulation by counsel, without waiving objections to the evidence, that receipt No. 8491 was for 250 bags of timothy seed, weighing 30,742 pounds, and contained in Division D, Section 11, third floor. Date of warrant October 22, 1900. But Messrs. Elsdon, Kerr and Peckham object to the warrant as immaterial, irrelevant and not proper under the issues, and as not relating to the issues included in this reference.

Mr. WYETH: I offer from warrant No. 8996 of the National Storage Company that has been produced, as follows: "Acknowledges to have received 250 bags of timothy seed, said to weigh 31,341 pounds, contained in Division D, Section 4, third floor."

(Objected to by Messrs. Elsdon, Kerr and Peckham, on the grounds heretofore mentioned in the objections to the introduction of the previous slips.)

39 Offer by Mr. Wyeth from warrant No. 9338, as follows: "'National Storage Company hereby acknowledges to have received 250 bags of timothy seed, said to weigh 32,500 pounds, contained in Division B, Section 2, fifth floor."

(Objected to by Messrs. Elsdon, Kerr and Peckham, for the same reasons that the last preceding exhibit was objected to.)

Offer by Mr. Wyeth from warrant No. 9120 that the National Storage Company acknowledges to have received 250 bags of timothy seed, said to weigh 30,914 pounds, contained in Division B, Section 16, fifth floor, dated December 24, 1900.

(Objected to by Messrs. Elsdon, Kerr and Peckham, for the same reasons that the last preceding exhibit was objected to.)

Mr. Wyeth offers from warrant No. 9119, as follows: "National Storage Company acknowledges to have received 250 bags timothy seed, weighing 31,248 pounds, contained in Division B, Section 2, fifth floor, dated December 24, 1900."

(Objected to by Messrs. Elsdon, Kerr and Peckham, for the same reasons that the last preceding exhibit was objected to.)

All said warrants having reference to the bankrupt's Johnson street warehouse.

WITNESS (continuing): I know the book handed me marked with the figure 5 on the outside. It is the order book of Alexander Rodgers, one of the regular books of account used in his late business. Speaking in a general way, the book now shown me shows from page to page the sales and the weights of seed that were shipped out. I was not the book-keeper. Some of the en-
41 tries on page 9 of that book were made by me. I put down the weights of these 250 bags of timothy seed with circle R. S. I. The R. S. I. refers to the mark that was on the bags.

(Objection by Mr. Elsdon to the witness testifying from the book until there is proper foundation laid for it.)

Q. I will ask you if you know what these entries that you have been referring to as made by you refer to, that is, what transaction?

(Objection by Mr. Elsdon for the same reason.)

A. Why, it was 250 bags of timothy seed shipped to W. G. Scarlett, Jr., & Co., Baltimore.

42 (Motion to strike out on the ground that it is irresponsive.)

WITNESS (continuing): I made this entry of 250 bags and 31,131 under the word "weights" on this page from the original slip in evidence when it was weighed in the store. The slip that I made it from is "Black Exhibit 16."

43 Q. I will ask you to state, if you know, looking at Black Exhibit No. 16, what was done with the seed mentioned therein?

(Objected to by Mr. Heckman, Mr. Peckham and Mr. Kerr as immaterial and irrelevant.)

A. These 250 bags of timothy seed were shipped out on March 27th to William G. Scarlett, Jr., & Co., of Baltimore. I put down the weights for the car and weight for the fifty bags of millet that went with that timothy seed, and saw that it was
44 loaded in the car on the track. I put the weights down on

the order sheet here. The order sheet consists of page 9 of this Book 5 which I have identified, but at the time this was put down there it was not in book form. This sheet was out. I placed the weights, the 250 bags gross weight, 31,031 pounds, and tare 250 pounds, making 30,781 pounds. Tare is made up of a pound for each bag. In the slip Exhibit 15 the tare is also expressed in the same manner; 250 bags subtracted from 31,031.

(Motion by Mr. Heckman, Mr. Peckham and Mr. Kerr to strike out all the testimony as to the disposition of that property as immaterial and irrelevant.)

Page 9 of the book which witness testified in regard to was marked "Black Exhibit 34" for identification.

WITNESS (continuing): The book marked 4 on the outside
45 shown me is an older book than the previous one, but of the same character as Book 5, and immediately prior to it in date. I didn't make any entry of the transaction referred to in Black Exhibit 24, any more than on the order I put down the stock and what to ship. All I put down was the car number and the lot to ship on that particular order. I refer to order No. 3805 to George Keith, Toronto, shown on page 796 of Book 4 referred to.

46 (Motion by Mr. Elsdon to strike out the answer of the witness, on the ground that he knows nothing personally about the sale having been made, and that he did not make the entry on page 796.)

WITNESS (continuing): I don't remember of my own recollection anything about any shipment out of this seed. On page 796 of this Book 4 I put down the stock mark 26,681. Don't know where I got those figures from, but weighed a car of that kind in store, and that is what we have here to ship. It was to be shipped out of this car marked Black Exhibit 24. The seed that was sold was property marked 26,681.

47 (Objection by Mr. Peckham.)

WITNESS (continuing): Could not state positively where I procured the number 26,681 on page 796 when I made the entry. I know it would not come from that slip Black Exhibit 24; the seed would, but the number is a different thing entirely.

48 (Page 796 marked for identification Black Exhibit 35.)

WITNESS (continuing): The weights of 250 bags of timothy seed and fifty bags of clover seed on page 926 of this Book 4 are entries made by me, also the stock mark, also all under the stock mark under the word "Bags" and under "Weights"; in that column the figures are all made by me. Not all the lead pencil

marks. These (indicating) are not made by me. I made
49 those entries at the time the carload of seed was being shipped out. I took the weights of 249 bags in those entries from the memorandum when the seed was put in store. Black Exhibit 23 is that memorandum. In making the entries on page 926 I used the memorandum. This car R. R. Z. had only 249 bags in it, and we only shipped out 250, adding one bag, weighing 134 pounds. That is all I can state with regard to the entries on page 926.

(Motion by Mr. Heckman, Mr. Kerr and Mr. Peckham to strike out all testimony as to the transaction testified to as immaterial, irrelevant and incompetent.)

WITNESS (continuing): In this Book 5 there are some
50 entries on page 360 made by me. I took the weights from the original weighing of the car of seed in making the entries. I put down these weights here (indicating), the stock mark, circle R. S. Z., 250 bags of timothy seed, weighing 32,935 pounds gross, tare 250, net 32,685. The letters A. & A. under there refer to American and Amoskeag bags. That is in my handwriting. Black Exhibit 21 is the weighing slip that I referred to from which I procured these marks that I entered on page 360.

(Motion by Mr. Heckman, Mr. Kerr and Mr. Peckham to strike out all the evidence concerning this page as irrelevant, immaterial and incompetent.)

(Witness temporarily withdrawn.)

WALTER TOD, called on behalf of the National Storage Company, examined by Mr. Elsdon, testified as follows:

51 My business is that of making loans and investments. Am treasurer and acting manager of the National Storage Company. I have in my possession the memoranda showing valuations of the seed upon which we issued warrants offered in evidence. (Witness produces same.)

Q. Will you state what the total valuation is, under those memoranda, of the warrants issued to Alexander Rodgers and now held by the First National Bank of Chicago?

(Objected to by Mr. Wyeth on behalf of the creditors and the trustee as immaterial and incompetent, but not making the objection of incompetency on the ground of form of the question or that no original valuation slip sheets are produced.)

A. $13,393.35.

52 WITNESS (continuing): I took this from the original valuation memoranda already in evidence in this case.

Q. What are the regular storage charges, the total due under those valuations upon the warrants issued by you and held by the First National Bank, as you have already testified?

(Objected to on behalf of the trustee and the creditors, on the same ground, immaterial and incompetent.)

A. $400.05.

WITNESS (continuing): I arrive at that amount by basing the charge for the month of April upon the ordinary risk, which would be $10.05. I charge seventy-five cents per thousand dollars per month on property of the valuation of $13,393.35. The balance of $390 is the charges for additional risk for the months following April, being May, June, July and August, 1901, based on the rate of $7.50 per warrant per month. There were thirteen
53 warrants. I get the rate of seventy-five cents per thousand, and $7.50 per warrant per month from the contract already in evidence marked "Exhibit A." The total valuation of the seed under the warehouse receipts issued to Rodgers and now held by H. W. Rogers & Bro. is $6,588.32. I got that valuation from the original valuation memorandum on file received from Rodgers at the time of the issuance of the warrants. Those are the valuation memoranda that are in evidence in the case.

Q. Now, will you state what, under the contract and based on that valuation, the storage charges would be?

(Objected to on behalf of the creditors and the trustee, for the same reason that the last objection was made.)

A. $154.94.

WITNESS (continuing): I arrived at that amount by basing the charge for the month of April upon a valuation at the rate of seventy-five cents per thousand dollars per month, for the months of May, June, July and August. That would be $4.94 for the one month. For the months of May, June, July and August, at $7.50 per warrant per month, $150. These two amounts that I have
54 given as due on the First National Bank warrants and on the H. W. Rogers & Bro. warrants do not include anything for custodian's fees actually paid by us. No portion of these amounts due for storage charges I have testified to have been paid to our company. These amounts are claimed to be due on warrants now held by the First National Bank and by H. W. Rogers & Bro., respectively.

Cross-Examination by Mr. Wyeth.

I refer to the contract, Exhibit A, as a whole in estimating the amount of storage charges that I have testified to. I speak of regular storage charges in April, and then mention other storage thereafter at $7.50 per month per warrant. Paragraph marked with the figure 3 in the contract, Exhibit A, relates to that. Our company has no other contract with Rodgers relating to storage charges
55 or expenses than Exhibit A. I make my estimate of the amount of the storage charges, except for the month of April, on this paragraph No. 3 in connection with other paragraphs—with the succeeding paragraphs, especially Paragraph 8.

Re-direct Examination.

Q. What additional services and risks were there upon which you made this charge of $7.50 per month per warrant in each case?

(Objected to on behalf of the creditors and the trustee as incompetent and immaterial, and because no proper foundation is shown for the making of the charges.)

A. The risk of the loss and removal of property. Removal or disturbance of property. I will also add, and the additional risk and expense of the—I should say of the records, perhaps, each one devolving special and additional care and record.

(Motion by Mr. Wyeth to strike out the answer.)

WITNESS (continuing): Warehouse receipts in those cases
56 were outstanding during all these months of April, May, June, July and August, 1901.

Re-cross Examination by Mr. Wyeth.

I think I am expressing the terms of the contract when I say that there was additional risk of loss and disturbance of property, and that it was worth $7.50 per month per warrant. The charge is based on the condition of the contract which is provided for in Paragraphs 3 and 8 and the other paragraphs in connection with those. I should hardly say it is true that I simply make up an estimate aside from that on behalf of the National Storage Company as the treasurer of the company. I suppose the risk of loss and disturbance that I speak of has reference to the matter of Rodgers having become bankrupt and a receiver having been appointed over his property, and the matters that followed on after May 8th in

connection with the bankruptcy proceedings. The fact that the warrants were not used and had been hypothecated and passed
57 from his possession, as the contract provides, the additional charges were made. The contract provides that we may make any additional charges under this contract for the simple fact that warrants are hypothecated. I should say the cost of the pledging of the warrants was a risk of loss or disturbance or expense that has arisen because of the bankruptcy proceedings.

Q. Well, when prior to May 8th warrants had been pledged from time to time since August, 1900, did you ever make additional charges?

(Objected to as immaterial.)

58 A. The company never had notice that the warrants were pledged, and we had no basis for such charges. We had no knowledge of the warrants being pledged.

WITNESS (continuing): The amount of $7.50 per month per warrant is provided for in the contract. That is not my own estimate; it is the estimate of the officers of the company. I should say the officers made the charge, or directed that it be made.

Q. Now, you speak of expense of records, and each warrant involving additional care and record. Was there any additional care and record needed other than that which has arisen in connection with this litigation?

(Objected to as calling for the legal conclusion of the witness.)

A. I don't know.

WITNESS (continuing): There were entries made on the books of the company of charges made in May, June, July and since. They were such as required more care and work than would have been made under ordinary circumstances of the business continuing without bankruptcy. It is impossible for me to tell
59 the detail. I think prior to the sale of the property the company entered upon its books a charge each month for increased storage, care, etc. Don't know the date of the sale of the property. So far as book-keeping and the entering up in the books is concerned that would be more expensive that it would be in the ordinary course of business. There would be more details in the records, the various changes. It is not a fact that all the Storage Company had to do so far as the records were concerned was to wait until the seed was disposed of and then make up its estimate for its charges. There were various items; it is impossible for me to specify what they were. There was danger of risk of loss
60 or disturbance of property by various parties other than the

receiver or trustee in this case. Various parties were freely admitted to the building. That was after the receivership. There is none of this risk and disturbance that we claimed for that existed prior to May 8th.

Re-direct Examination.

Referring to the eighth paragraph of the proposal for warehousing contract which provides for increased cost or additional services or risk incurred by reason of the sale or pledge of the warrants and property covered thereby, there was increased costs incurred by us by reason of the sale or pledge of these warrants for the time and expense of inspector and custodian going
61 through the premises. I think I corrected what I said on my cross-examination about the company making an estimate, and said that they made the charge. The amount due under the warehouse receipt is fixed by the contract; the charge is based on that.

Re-cross Examination.

62 During these months of May, June and after, the company used additional custodians. They were custodians that we put in there during the receivership. We needed an additional inspector to the one we had regularly had. Did not engage any additional inspectors. From May on for a portion of the time, the larger portion, I think, Mr. Rand was the inspector. He was needed for other business. We were obliged to have more additional
63 time of inspectors to go around and look at our property. It involved additional time on business of Rodgers. It made additional money expense to the company with reference to Rodgers' business. Impossible for me to name the amount. The company used this same inspector for its other business during a portion of his time. There was additional time and expense of an inspector during May and after. That consisted, as I have said before, of his time and his expenses inspecting and looking after the property and the custodians who were there and other matters in con-
64 nection with it. In order to do that he made trips to these warehouses. Could not tell how often, but frequently. The company had to hire during this time an additional inspector to do its business; could not tell whom. The inspector that went down to the warehouse of Rodgers during this period spent more time at it than he would have spent under ordinary circumstances, or that he did spend during the months immediately prior to May 8th. I don't know how often he went down prior to May 8th as a

definite number. Can tell you that I know in a general way that he went frequently.

65 (Motion by Mr. Wyeth to exclude the evidence and testimony of Tod, offered this morning, on the ground that it is immaterial and incompetent; also repeat the motion to exclude his testimony as to all items except the charge of $10.05 spoken of as regular storage, and $4.94 spoken of as regular storage, on the ground that the same is immaterial and incompetent.)

THOMAS A. BLACK, resumed on behalf of the trustee, examined by Mr. Wyeth, testified as follows:

66 Referring to page 644 in Book 4, I made a portion of the entries there on January 31, 1901. The date of the page was made by me and the weights of the car of timothy shipped, and the portion under the number of stock marks. The word "Naomi" and the stock mark "R. circle Q. X." We copied the weight from the original slip when the car was put in store. Exhibit Black 25 is that slip.

Q. Will you state whether or not this on page 644 referred to an original entry in connection with the transaction?

67 (Objected to by Mr. Elsdon as calling for the legal conclusion of the witness, and also because it appears that it is not an original entry.)

A. As far as the sale goes it is the original entry.

WITNESS (continuing): That is the original particular of the sale. That is the entry on page 644, in connection with the order. This is the entry made of the weight and number of bags and the entry of the sale proper is not made anywhere else that I know of. I kept this slip, Black Exhibit 25.

(The page referred to was marked "Black Exhibit 36" for identification.)

WITNESS (continuing): There are entries on page 28 in
68 book 5 made by me, showing that I weighed a car of timothy seed, marked circle R. R. K., 250 bags, weight 31,614 pounds." The marks on the bags were circle R. R. K. and the bags are American and Amoskeag, 19 "Naomi." In that case I weighed out the whole of the lot that was sold, as it was sold. The figures at the bottom of the page represent the carload of timothy seed, 250 bags. There are six bags weighed at a time, with the exception of a few places where there are seven to a draft, and some places five to a draft. I am able to identify where that lot of seed came from.

It came from Division B, Section 30; that number is entered
69 there. It was placed above the stock mark and is in my handwriting, in Division B, Section 30. All the figures you have been asking me about, including B, 30, were made by me. Black Exhibit 3 was not used in connection with that transaction. That is the weight of the car when it was put in store, but it was not used after that, and the car was reweighed when it went out.

(The page of the book last referred to marked for identification "Black Exhibit 37.")

WITNESS (continuing): There are entries made by me on page 633 of book 4. That was 250 bags of timothy seed, gross weight, 30,992, tare 250, net 30,742, "Naomi," on the bags, also shipping mark circle R. Q. Z. I see some other marks to the
70 right of the weight of the 250 bags. That was five bags of Alfalfa, five bags of Alsike, one of fancy red top, and one of chaff red top. They refer to other parts of this transaction than the 250 bags of timothy seed. The timothy was shipped. The entry of 250 bags was made from the original weights when it was placed in store. Black Exhibit 28 is the slip I used in making the entry on page 633, and there was no reweighing of the 250 bags.

(The page testified to marked for identification "Black Exhibit 38.")

WITNESS (continuing): There is no other entry made of this in connection with this order by me before I made the entry on this page 633. I took it from the memorandum exhibit that I have referred to.

(Messrs. Elsdon, Kerr and Peckham objected to the evidence
71 as to page 633, and moved that it be stricken out, on the ground that it is incompetent, immaterial and irrelevant, and also because it appears from the evidence of the witness that the book is not a book of original entry so far as this transaction is concerned.)

WITNESS (continuing): There are entries on page 873 in this book made by me, namely, the weight, 250 bags timothy seed, 31,432, tare 250, net weight 31,182, "Naomi" bags, also stock mark circle R. R. V. That car was shipped to A. Seel & Co., Baltimore, Maryland. I know that of my own knowledge. Obtained those figures from the original slip when the car was put in store.
72 Black Exhibit 12 is that slip. The grain was not reweighed when shipped out.

(The page testified to marked for identification "Black Exhibit 39.")

73 (Motion by Messrs. Elsdon, Kerr and Peckham to strike out the evidence with reference to page 873, on the ground that it is immaterial, irrelevant, and incompetent, and because it appears that there is evidence that the entries on the page are not original entries.)

WITNESS (continuing): There are entries on page 884 in this book 4 made by me, as follows: 250 bags of timothy seed, marked circle R. S. B., 31,769 pounds, tare 250, net weight 31,519, "Naomi" bags. That was a car of timothy seed shipped to the Kelly Company, Cleveland, Ohio. I remember there was such a shipment. I took the weights from the original slip, Black Exhibit 13, when the car was put in storage.

(Page testified to marked for identification "Black Exhibit 40.")

(Motion by Messrs. Elsdon, Kerr and Peckham to strike out the evidence as to the entries on page 884, as incompetent, immaterial and irrelevant, and as not original entries.)

WITNESS (continuing): These marks and figures on page 884 were not made anywhere else by me or by anybody prior to their entry here, except on the slip Black Exhibit 13, to my knowledge. After those slips are made they are put into the storage book. Any entry in the storage book would be made about the same time this slip was made. I don't know of any other entry made before I made these entries here in connection with the transaction shown on page 884, so far as these numbers or weights are concerned, or marked.

74 Referring to page 654 of this book 4, I put down the weight 250 bags timothy seed, marked circle R. Q. R., 30,845 pounds gross, tare 250, net 30,595, American and Amoskeag bags. The car was shipped to W. H. Small & Co., Evansville, Indiana. I made that entry February 4th. It is shown on the right upper-hand corner of these figures. I obtained the weights from the original weighing of the order. Black Exhibit 32 is the slip. I know this order shown on 654 was filed. The rest of the entries on the page
75 were not made by me. The T. A. B. after the words "weight by" is mine, a sort of monogram. I made the words "R. circle Q. R." under "shipping mark," the same as the other. In connection with that transaction there was no other entry made of those numbers and marks than I testified to before those made on page 654. That is, in connection with the transaction, these were entered from this slip.

(Exhibit referred to marked for identification "Black Exhibit 41.")

(Same motion by Messrs. Elsdon, Peckham and Kerr as to the other pages testified to by the witness.)

Cross-Examination by Mr. Elsdon.

In reference to folio page 9 of book 5, I testified that a portion of the entries on that page were made by me from Black
76 Exhibit 16. I made the entries at the time the car was shipped out, superintended the shipping out of it. Had something to do with loading it. I tell that by that (indicating) that it was loaded on the track. The word "track" is in my handwriting. Was there when it was loaded; did not load it myself; did not reweigh the goods when they went out, simply took the weights from this slip, Black Exhibit 16. You see these were weighed into store, I think, on the 26th and were weighed out on the 27th, and when they are as close together as that, to save labor we never reweigh them; they were in the store only one day. I identify the goods described on page 9 of book 5 with Black Exhibit 16 by the sample
77 mark R. S. I. Got that mark from the bags. I mean to say there were no other goods in the store marked with that mark. Had nothing to do with the taking of this order in this particular case. I know this was a sale to William G. Scarlett, Jr., because that is a regular order there. Somebody else wrote down the order and turned it over to me to put in the weights; that is all I know about it. Don't know anything about the goods having been actually sold to Scarlett; I didn't sell them. Had nothing to do with the transaction but to ship it; to make the weights, and in this case to load it on the track. That is true substantially as to these other pages I have testified to. In one instance only I weighed
78 the goods; that was in reference to Black Exhibit 3. I testified that as to Black Exhibit 3, shown on page 28 of book 5, the goods were reweighed by myself; that is, I balanced the scales and had my men run them on the scales; I then balanced them, and put down the weight, and made these entries at that time. I did that with reference to Black Exhibit 3. I had nothing to do with the upper part of the writing here, "Allen Kirkpatrick & Co.,"
79 in ink. Don't know anything about the sale. Didn't make it, nor the sales in reference to any of these exhibits that I have testified to. All I did was to put down the marks on each of these pages, and the weights, and marks, perhaps, on the bags. In each of the cases I have testified to I put down the stock marks and marks on the bags. Where I copied these weights from the slips testified to I copied them direct from the slips. I don't know anything more about the correctness of these slips marked Black Exhibits 16, 24,

etc., from which I copied into the pages of this book, than I did when I testified on the former hearing before the referee in reference to the slips.

80 Mr. WYETH: I offer in evidence statement marked "E. J. Blossom's Exhibit 2" of this date, being a statement from the ledger accounts of the First National Bank since January 1, 1901, of Alexander Rodgers to the bank, represented by notes, together with a showing as to payments thereon, as a transcript of the ledger account, same having been called for in connection with Mr. Blossom's testimony heretofore.

Statement is as follows:

E. J. Blossom, Exhibit 2, of Oct. 28/01.

ıscript of Account Alexander Rodgers from Discount Ledger of the First Na ınk of Chicago.

ALEXANDER RODGERS:

			No.		Amt. Due.			Payments.	When Paid.	Amt.
1901,	Coll.		8594		$2,250	Demand				
"	"	W. R.	9749		4,500	"				
1900,	"		50276	Bal.	2,700	"	1/7/01	$2,000	Jan. 29	$2,700
							1/29	700	" 29	2,000
"	"		51543		2,000	"				
"	"		51784		5,500	"	2/9	750		
							3/9	1,200		
							3/11	1,200		
							3/18	1,200		
							3/29	1,000		
							4/11	150	Apr. 11	5,500
"	"		2545		6,000	"	4/24	$2,000		
							4 11	1,890		
							5 1	300		
							5/2	1,000		
							5/4	650		
							5/7	300	May 7	6,000
							5/7	1,700		
"	"		3480		2,300	"	5/8	1,296.82		
"	"		7621		3,500	"				
1901,	"		12766		1,200	"				
"	"		14142		1,200	"				

October 31, 1901.

WILLIAM CLEMENS, sworn on behalf of the trustee, examined by Mr. Wyeth, testified as follows:

81 I testified on the former reference, and was asked on my examination some questions with regard to certain slips called
82 storage slips. I made up part of storage slip dated April 29, 1901; made up the totals and final figures. It was in connection with the placing in or weighing in of seed in Section 4, Division B. So far as I can say the final total of figures there is the correct amount, as I ascertained, at that time, of seed that was placed in that division and section. These are the figures that I made at the time in connection with the transaction. The words, "Div. B, Sec. 4," the figure "5th floor," were made by me, I should judge, on April 29th. That is the date at the top of the slip. The total would be in this right-hand column, 28,131. That seed was
83 put in there at that time, to the best of my knowledge. I weighed a portion of it. Could not say whether there was any other lot of seed in that section and division when I put this in there. Don't know whether or not there was room for another pile, or whether there was any other pile. So far as I remember, I don't think there was any other lot of seed in there; that is all I can say on that.

The slip introduced in evidence as "Clemens' Exhibit 1" as follows:

CLEMENS' EXHIBIT 1, OCTOBER 31, 1901.

Storage slip. Date 4/29/01, 250 bags of Timothy; 28,131 pounds. Div. B. Sec. 4, Floor 5.

(Objected to by Messrs. Elsdon, Peckham & Kerr as not proper under the issues involved in this reference, and as incompetent, immaterial and irrelevant; and also to strike out the evidence of the witness for the same reason.)

Stipulation that all objections made to the testimony offered by the trustee are made on behalf of the First National Bank, H. W. Rogers & Bro., and the National Storage Company.

84 WITNESS (continuing): A portion of page 303 in this book 5 was made by me, namely, the number of bags and the weight, 250 bags, 31,013 pounds, and the markings underneath, the number "Naomi." That was shipped out from somewhere in Rodgers' building. I don't recollect having anything to do with that shipment, only from what is on the slip. I must have got

the entry of the number of bags and weight and markings from the storage slip, I should think. Have not an independent
85 recollection. I mean by storage slip one of those slips you have there, similar to the one I have just been testifying about. I have not any definite recollection of taking it off the slip marked Black Exhibit 18. I might have got the mark from the storage book. So far as I now know or recollect, there would be no other place that I would get it only in there and from this slip. Cannot state anything further than I have already stated as to where I got this weight and the number of bags. The book now shown
86 me is that storage book, or one similar. Was accustomed to use the storage book, so that I think I would be able to identify it if I saw it. This book is the one used by me. Could not tell whether I got it from this or from one of those slips. On page 22 I point out an entry that corresponds, so far as the weight is concerned, 31,013 pounds. Looking at that and the further entry on the same line on that page, I don't see anything there that enables me to make any further statement as to how I came to enter this number on page 303, that would aid me any, so far as I know now.

87 A portion of page 168 of this book 5 was entered by me, namely, the number of bags and weight. That is the lower portion of the page. The number 250 and the weight 31,794, also the word "net," also the word "Naomi," which is just above the weights, R. in circle and S. S. There is no other writing on the page by me. That amount of seed was shipped out from the warehouse and was put down there as the weight. I did that work and made that entry in connection with the order of shipment. Have no more recollection as to where I obtained the number of bags and the weight and marking than I did on the other slip. Have only the same recollection that I testified to as to page
88 303. Could not say definitely whether I have ever seen storage slip Black Exhibit 4 before or not, nor whether I used it in connection with this transaction.

I made a portion of the entries on page 376 of book 5 on the lower part of the page, the number of bags, 250, and the weight, 29,341, under the word "weights." No other portion was
89 made by me. That particular lot was stored in the warehouse. I take that from these words "stored 5/7, 2 E. 6". Have not any independent recollection about its being stored rather than shipped out. I remember there were two cars sold to this party, Kirkpatrick, that was stored. I identify this lot of 250 bags as stored from the slip, that is all. Could not say whether I had seen Black Exhibit 5 at the time of making these entries or not. Very likely procured this information from one of these slips. Can

not state anything different in regard to that than what I did as to the other two cases I have testified about. The same facts apply to this as applied to those, in substance.

I made the entries on the lower part of page 317 of book 5; that is, the number of bags, 250, and the weight, 30,226 pounds, also the marking there, Amer. & Amos. That is the brand of bags. Don't remember any more than I do as to the others with regard to my making that entry, and when I made it, and what business transactions were connected with it. It was shipped as going to that firm. On looking at slip Black Exhibit 30 am not able to state any more than I did as to the others.

Cross-Examination by Mr. Elsdon.

In writing down the number of bags, weight and marks on these four pages in this book 5 that I have testified to, there is nothing but the routing there on the car that would refresh my recollection as to whether the goods were shipped out or not. That routing is not written by me. All I did with reference to those pages was to put down these bags, weights and marks, and I am not quite sure as to where I got my information to put that down. Had nothing to do with selling the goods in there; so when I say that a certain lot was shipped out I assume that is so from the fact that I had put down these numbers on that page, but as to the written part at the top of each page, I had nothing to do with that. The same is true with reference to the entry on page 376, where I testified that the lot was stored. The word "stored" is put where the word "routing" is. I didn't put the word "stored" in there. I know the goods were stored, that is all, independent of the entry there. I have seen the order from Kirkpatrick. I put down the weight there, that is, filling the order; it was stored; I was there when it was stored. Am not sure where those weights came from. Came from one of two places. They were not shipped, but stored. I was there when they were put in storage. Could not say positively, but think I ran the elevator part of the time. Ran it quite frequently there at the warehouse. Have not any positive recollection as to whether on this particular occasion I ran the elevator.

Re-direct Examination by Mr. Wyeth.

I made these entries on these four pages. They were not then bound up in this book. Had the book then in my possession in Rodgers' shipping office. We were putting down

the number of bags and weights. The goods were shipped or stored in the warehouse. The top portion of these pages, after the words "sold to," were already written in the slip when I made these entries. The page came out of the office. I think that I had this page 317 with me in the shipping room when I made this entry. In the shipping office the seed was weighed, the scales were there, and it was put down on the slip for the purpose of keeping a record if the seed was either shipped or stored.

97 Q. Then is it true or not that you made these several entries in this book 5 in connection with either a shipment out or the storing in of goods for a party, or how was it?

(Objected to as leading, and assuming that the goods were shipped out or stored.)

A. They were entered there either when they were shipped or stored in the warehouse.

(Answer objected to, and motion to strike out, on the ground that it assumes that the goods were either shipped or stored there when the witness has already testified he had no knowledge as to whether they were shipped or stored.)

Q. Referring to your last answer, will you state whether or not that is true with regard to all these entries that have been referred to on these four pages made by you?

(Objected to as leading.)

A. Yes, sir.

(Motion to strike out the answer, on the ground that it assumes the goods were either shipped or stored there when the witness has already testified he had no knowledge as to whether they were shipped or stored.)

98 *Re-cross Examination by Mr. Elsdon.*

I cannot definitely state that with the exception of this lot that was stored that I referred to these lots were shipped out at the time; I am simply assuming that from the fact that certain writings appear on each of those pages.

EMIL VAAS, sworn on behalf of the trustee, examined by Mr. Wyeth, testified as follows:

99 I testified in this case before. Was book-keeper for Rodgers from about January 1, 1901, until he closed business.

Papers marked Vaas Exhibits 1, 2, 3, 4, and 5, respectively, introduced in evidence, especially the last column, called the balance column, being monthly statements made by the First National Bank of Rodgers' deposit account in the bank.

(Objected to as incompetent, immaterial and irrelevant, but not for the reason that they are not the best evidence.)

Said exhibits are as follows:

VAAS' EXHIBIT "1."

DATE.	TOTAL CHECKS.	DEPOSITS.	BALANCE.
1900.			
Dec. 31			2,152.71
1901.			
Jan. 2	851.77	2,489.44	3,790.38
3	3,527.14	1,421.77	1,685.01
4	1,056.29		628.72
5	618.00		10.72
5		2,250.00	2,260.72
7	3,334.17	1,704.88	631.43
8	436.23	1,855.54	2,050.74
9	1,258.84		791.90
10	714.04	549.64	627.50
10	50.00		577.50
11	171.19		406.31
12	36.37	3,233.62	3,603.56
14	120.00	1,838.99	5,322.55
15	3,302.29	1,830.29	3,850.55
16	1,435.13		2,415.42
17	1,050.22	3,657.37	5,022.57
18	3,299.46	452.54	2,175.65
19	15.00		2,160.65
21	2,467.53	303.96	
		4,500.00	4,497.08
22	2,179.08	4,864.82	7,182.82
23	2,881.33	1,467.88	5,769.37
24	4,156.94	99.43	1,711.86

25	230.60	434.89	1,916.15
26	42.45		1,873.70
28	2,590.50	1,642.69	925.89
29	4,943.00	4,589.06	572.25
30	1,319.32	1,134.15	1,387.08
31	1,708.70	1,552.09	1,230.47

VAAS' EXHIBIT "2."

DATE. 1901.	TOTAL CHECKS.	DEPOSITS.	BALANCE.
Jan. 31			1,230.47
Feb. 1	3,308.79	2,930.56	852.24
2		153.96	1,006.20
4	490.14	168.10	684.16
5	2,116.60	1,722.29	289.85
6	2,086.10	4,048.51	2,252.26
7	3,447.71	1,857.30	661.85
8	54.40	1,729.08	2,336.53
9	959.50	791.54	2,168.57
11	150.00	869.24	2,887.81
13	4,442.24	5,630.80	4,076.37
14	3,380.42	2,960.21	3,656.16
15	3,843.56	254.97	67.57
16	131.84	2,190.68	2,126.41
18	245.72	1,569.60	3,450.29
19	2,438.43	1,038.91	2,050.77
20	4,591.57	5,276.76	2,735.96
21	86.71	2,347.60	4,996.85
23	4,864.47	210.45	342.73
25	179.06	983.46	1,147.13
26	2,132.71	2,372.87	1,387.29
27	4,282.33	2,458.72	
		1,200.00	763.68
28	275.65	1,093.24	1,581.27

VAAS' EXHIBIT "3."

DATE. 1901.	TOTAL CHECKS.	DEPOSITS.	BALANCE.
Feb. 28			1,581.27
Mar. 1	4,924.63	4,247.68	904.32

2	2,212.99	2,009.39	700.72	
4	537.20	2,112.22	2,275.74	
5	198.20	981.38	3,058.92	
6	2,378.32	640.08	1,320.68	
7	728.98		591.70	
8	2,256.61	1,835.51	170.60	
9	2,492.49	4,474.71	2,152.82	
11	2,668.26	2,223.60	1,708.16	
12	795.82	2,576.56	3,488.90	
13	3,367.62	343.45	464.73	
14	2,368.14	613.90		
		1,200.00	89.51	overdraft.
15	2,698.16	3,083.64	295.97	
16	73.82		222.15	
18	1,633.16	6,317.40	4,906.39	
19	4,775.21	1,774.39	1,905.57	
20	2,442.04	798.81	262.34	
21	2,877.87	2,672.98	357.45	
22	81.28	4,245.24	4,221.41	
23	3,097.98	1,028.18	2,151.61	
25	2,283.71	3,257.75	3,125.63	
26	3,785.81	1,997.81	1,337.65	
27	1,781.69	1,852.73	1,408.69	
28	605.86	1,844.49	2,647.32	
29	2,567.47	2,700.17	2,780.02	
30	1,655.22	936.30	2,061.10	

Vaas' Exhibit "4."

DATE. 1901.		TOTAL CHECKS.	DEPOSITS.	BALANCE.
Mar.	30			2,061.10
Apr.	1	2,046.77	2,358.60	2,372.93
	3	1,520.02	2,272.41	3,125.32
	4	3,365.78	2,863.92	2,623.46
	5	3,961.20	1,448.91	111.17
	6	58.83	2,910.33	2,962.67
	8	2,824.81	2,896.28	3,034.14
	9	1,555.69	512.28	1,990.73
	10	2,531.77	1,897.85	1,356.81
	11	2,000.28	1,840.66	1,197.19
	12	359.01	3,013.21	3,851.39
	13	1,508.65	324.19	2,666.93

15	412.97	980.76	3,234.72	
16	1,379.50	359.61	2,214.83	
17	3,319.90	2,360.04	1,254.97	
18	597.72	719.01	1,376.26	
19	75.29		1,300.97	
20	100.00	854.10	2,055.07	
22	2,481.49	801.59	375.17	
23	1,769.50	2,515.78	1,121.45	
23	125.86		995.59	
24	5,151.89	3,743.25	413.05	overdraft.
25	3,285.14	5,961.67	2,263.48	
26	2,451.33	527.09	339.24	
27	875.78	1,212.47	675.93	
29	125.50	331.99	882.42	
30	570.96		311.46	

VAAS' EXHIBIT "5."

DATE.		TOTAL CHECKS.	DEPOSITS.	BALANCE.
1901.				
Apr.	30			311.46
May	1	319.62	787.20	779.04
	2	1,155.60	1,529.21	1,152.65
	3	2,940.65	1,890.40	102.40
	4	927.08	1,299.85	475.17
	6	44.12		431.05
	7	2,318.41	3,184.18	1,296.82
	8	1,296.82		000.00

WITNESS (continuing): The payments made by Alexander Rodgers on his notes or discount loans in the bank were made 100 by checks on the general bank account of Rodgers with the bank, otherwise called his deposit account, that is, his commercial account. The interest was paid by memorandum check, the bank deducting it from the account. They thus drew for interest on his account the last of each month.

Mr. WYETH: I would like to offer in this connection the canceled checks of Alexander Rodgers on account of his discount loans which have been referred to, beginning with the check dated January 29, 1901, the checks just referred to, and I will ask you to look at them and state whether or not those are the checks that were used to make payments on the discount loans of Rodgers from January 29th.

(Objected to as immaterial, incompetent and irrelevant.)

A. Yes, sir.

Checks, marked Vaas' Exhibits 6 to 17, both inclusive, as follows:

VAAS EXHIBIT "6."

Check. Jan. 29, 01. Alex Rodgers. On First National Bank, to order First National Bank. $2700.00. Paid Jan. 29, 01.

VAAS EXHIBIT "7."

Check. Feb. 9, 01. Alex Rodgers. On First National Bank, to order First National Bank. $750.00. Paid Feb. 9, 01.

VAAS EXHIBIT "8."

Check. Mar. 5, 01. Alex Rodgers. On First National Bank, to order First National Bank. $1200.00. Paid Mar. 9, 01.

VAAS EXHIBIT "9."

Check. Mar. 11, 01. Alex Rodgers. On First National Bank, to order First National Bank. $1200.00. Paid Mar. 11, 01.

VAAS EXHIRIT "10."

Check. Mar. 18, 01. Alex Rodgers. On First National Bank, to order Emil T. Vaas, endorsed to First National Bank. $1200.00. Paid Mar. 18, 01.

VAAS EXHIBIT "11."

Check. Mar. 29, 01. Alex Rodgers. On First National Bank, to order of First National Bank. $1000.00. Paid Mar. 29, 01.

VAAS EXHIBIT "12."

Check. Apr. 11, 01. Alex Rodgers. On First National Bank, to order of First National Bank. $2000.00. Paid Apr. 11, 01.

VAAS EXHIBIT "13."

Check. Apr. 24, 01. Alex Rodgers. On First National Bank, to order First National Bank. $2000.00. Paid Apr. 24, 01.

VAAS EXHIBIT "14."

Check. May 1, 01. Alex Rodgers. On First National Bank, to order First National Bank. $200.00. Paid May 1, 01.

VAAS EXHIBIT "15."

Check. May 2, 01. Alex Rodgers. On First National Bank, to order First National Bank. $1000.00. Paid May 2, 01.

VAAS EXHIBIT "16."

Check. May 4, 01. Alex Rodgers. On First National Bank, to order of First National Bank. $650.00. Paid May 4, 01.

VAAS EXHIBIT "17."

Check. May 7, 01. Alex Rodgers. On First National Bank, to order First National Bank. $2000.00. Paid May 7, 01.

101 WITNESS (continuing): These are canceled checks that have been returned by the bank.

Q. I will show you what appears to be memorandum checks, and ask you what they are.

(Objected to as immaterial and irrelevant.)

A. They are memorandum checks of interest paid on account of notes of Rodgers due in the bank.

WITNESS (continuing): They were returned as vouchers in connection with the various monthly statements. I don't know whether or not they are all of the interest checks since January 29th; they are very close to it—all so far as I know. These are also on the commercial account of Rodgers on the bank.

Checks introduced in evidence marked Vaas Exhibits 18 to 23, both inclusive.

(Objected to as immaterial and irrelevant.)

VAAS EXHIBITS 18, 19, 20, 21, 22 AND 23.

Memorandum Checks. Alex Rodgers. On First National Bank, to First National Bank for Interest. On demand Loans, said checks bearing the following dates, respectively, and amounts, respectively:

1/29/01, $5.72, $9.67; 1/31/01, $106.63; 2/28/01, $109.86; 3/31/01, $118.86; 4/30/01, $96.89. All cancelled on the day of their date.

WITNESS (continuing): The two books in evidence shown me as Books 4 and 5, are the order books, or what is commonly known as the sales books, in Rodgers' business. They form
102 a part of the regular books of account of Rodgers in his late Business.

Q. With reference to the sales or orders that have been spoken of, state whether these are books of original entry or not?

(Objected to as calling for the conclusion of the witness, who should state the facts.)

A. Yes, sir.

WITNESS (continuing): These pages appear in blocks of one hundred, and the order is entered upon a block, and the page torn from the block and put into the shipping room and weighed up. After that it is brought back again to the office for final computation of the account, and then put in this book. On receipt of an order from a party for seed, the blank is filled out with the name of the party, the destination and shipping directions, what road to ship by, the date when the order was received, the number of
103 the blank, and whether the party remits for the same or whether we made a draft upon the same, the number of bags to be shipped and each kind of seed. That is made out in the general office on one of those slips. Then it is taken out to the shipping office, where the weights are placed upon the blank, and returned again to the general office for final closing up of the account. In connection with the filing of such an order, there are no entries made up and entered into the books of account before this order; that is, in connection with the filling of the order or the transaction. I kept those books. The entries are made in the regular course of business, and are true and correct. They are made up as soon as the order is received. As soon as an order comes into the
104 office the blank is filled out as far as it can be filled out in the general office, and it takes its course until it comes back. Usually the goods are shipped immediately. We might complete these entries before the actual shipment was gone in some cases. I entered up the entries on page 9 of Book 5, in writing. There are two entries of Black Exhibit 34 that were made by me, the 30,781 pounds and the 7,137 pounds. The former is under the words "net weight." I made the entries in connection with the sale to W. G. Scarlett, Jr., & Co., Baltimore, Md.; I made them under the circumstances detailed a few minutes ago in filling an order to
105 Scarlett. I don't know of my own knowledge whether the goods were shipped out to them or not. There was a draft drawn on Scarlett & Co. I don't know whether it was paid. I have means of knowing what was done with the draft. I was usually accustomed to make the deposits in the bank for Rodgers.

Q. Will you turn to any memorandum you may have here with regard to the matter of the draft for that seed?

(Objection to any evidence with reference to these drafts and payment of them, on the ground that it is immaterial.)

A. There is part of the entry here (indicating), and there is part of the entry over on the next page.

WITNESS (continuing): I looked at the memorandum on the check stub book under the date of March 27, 1901, W. G. Scarlett, Jr., & Co., $1,236.71, and under March 28, 1901, $105.38; that makes up the amount on this page. Those are my memoranda.

They show that Rodgers received the amount of money speci-
106 fied there, placed to his credit in the bank. In other words, those two drafts drawn against Scarlett & Co. were deposited to Rodgers' account in the bank.

Black Exhibit 34 offered in evidence.

(Objected to as immaterial, irrelevant and incompetent, and on the ground that it is not shown to be a book of original entries, and also because it appears from the evidence that a portion of the entries therein contained are not original entries.)

Said exhibit is as follows:

BLACK EXHIBIT "34."

Book 5. Folio 9. Billed 3/27/01.
3/27/01. Sold to William G. Scarlett, Jr., & Co., Baltimore, Md.
Draft. Shipped via B. & O. track.
R, circle, SI. Net weight.
250 Bags Timothy, 30781 pounds. $1342.09.
50 Bags Millet 7137 pounds.
Stock Mark R, circle, SI. 250 Bags, 31031- 250, 30781.
A&A

WITNESS (continuing): I made the entries on page 303 of this Book 5 under ordinary circumstances of business—the sale of 250 bags of timothy to E. W. Conklin & Son. I made all the entries except the mark of the seed, R. S. W., and the number of bags and pounds, weight and bag name, on the lower half of the
107 page, at the time of these shipments. There was a sale to Conklin. We had an order from Conklin for 250 bags of timothy. There was a draft drawn for $1,152.72. It was deposited in the bank to Rodgers' account.

Page 303, marked "Vaas Exhibit 24," introduced in evidence.

(Objected to as immaterial, irrelevant and incompetent, on the ground that it has not been shown to be a book of original entry, and also that it appears from the evidence that a portion of the entries therein contained are not original entries.)

Said exhibit is as follows:

VAAS EXHIBIT "24."

Bk. 5. Folio 303.
4/22/01. Sold to E. W. Conklin & Son, Binghampton, N. Y.
Shipped by Lac.
Draft. 250 bags Pr. Timothy 31013. $1152.72
250 bags. 31013.
Naomi.

WITNESS (continuing): I made all the entries on page 796 of Book 4, marked for identification Black Exhibit 35, except the entries on the lower part of the page. They were entered in the
108 matter of the sale of 250 bags of timothy to George Keith, Toronto, Canada. The entries are true and correct, and made at the time indicated on the page. There was a draft drawn for that and deposited in the bank to Rodgers' account.

Page 796, marked for identification "Black Exhibit 35," introduced in evidence.

(Objected to as immaterial, irrelevant and incompetent, and on the ground that it is not shown to be a book of original entry, and on the further ground that it appears from the evidence that a portion of the entries therein contained are not original entries.)

Said exhibit is as follows:

BLACK EXHIBIT "35."

Folio 796. Bk. 4.
3/2/01. Sold to George Keith, Toronto, Canada. Shipped by
C. & G. T. Draft.
250 Bags Timothy, weight 31371. $1400.89
Stock Mark R26681 250 Bags, 31371.

WITNESS (continuing): I entered the order on page 926 in this Book 4 for 250 bags of timothy and 50 bags of clover for Patterson & Evans, Cincinnati, Ohio, March 20th.
109 Q. Was this an original entry of that sale? A. It was; yes, sir.

(Motion to strike out the question and answer as calling for a conclusion of the witness.)

WITNESS (continuing): A draft was drawn for this account of $2,108.18 and deposited in the bank to Rodgers' account at or about that date. The portions of page 926 entered by me consisted of the net weight, 32,091 pounds and 7,892 pounds. None of the entries on the left nor any of the shipping marks were made by me.

The paper was marked "Vaas Exhibit 25," introduced in evidence, and attention was called to fact, same page testified to by Mr. Black, but not marked on identification.

(Objected to as immaterial, irrelevant and incompetent, and on the ground that it is not shown to be a book of original entry, and on the further ground that it appears from the evidence that a portion of the entries
110 thereon contained are not original entries.)

Exhibit is as follows:

VAAS EXHIBIT "25."

Bk. 4. Folio 926.

3/20/01. Sold to Patterson & Evans, Cincinnati, Ohio.

		Shipped by B. & O.	
Draft.	250 Bags Timothy, weight 32091.		$1315.73
	50 Bags Clover		808.93
Stock Mark R, circle, RZ	249 Bags 31957.	Bags	43.50
	1 134.		
			2168.16
	Less freight		59.98
	250 32091.		
			$2108.18

WITNESS (continuing): I made the entry on page 316 in Book 5 for an order of 250 bags of timothy seed on April 24th. Made all the entries except the entry on the shipping mark, stock mark, and dates billed. I made the figures 30,109 under the words "net weight." I got that from the storage slip, I should judge, in a drawer in the desk in my possession. I had possession of and kept those storage slips. I refer to the storage slips, some of which
111 have been introduced in evidence. Black Exhibit 22 is one of those slips in my possession. I got the weight, 30,109 pounds, from that slip. The draft was made for $1,135.23 at the time, and placed in the bank to the account of Rodgers. I cannot tell

without looking whether it was for this exact amount or included other lots, but can state that at least this was included in the draft.

The page marked "Vaas Exhibit 26" introduced in evidence and objected to for the same reasons the last exhibit was objected to.

Exhibit is as follows:

VAAS EXHIBIT 26.

Bk. 5. Folio 316.
4/24/01. Sold to order A. R. Notify E. W. Conklin & Son, Binghampton, N. Y.

Draft. Shipped by Lock. line.
R. circle, SG. 250 bags timothy 30,109 $1135.23
Stock mark, B29, R, circle, SG.

All these drafts I am testifying about were deposited in bank at or about the time of the transaction.

112 WITNESS (continuing): I copied the original order on page 360 of Book 5. That is, simply order "A. R., notify H. W. Gardineer, Troy, N. Y.," and "250 bags of timothy," but not the prices and figuring. That was made in connection with the filling of an order to Gardineer May 1, 1901. A draft was 113 made for the amount of the bill, $1,211.17, and deposited in the bank May 2nd. All the drafts I am testifying about were deposited in the bank at or about the time of the transaction.

The page introduced in evidence, marked "Vaas Exhibit 27."

(Objected to for the same reasons the last exhibit was objected to.)

Exhibit is as follows:

VAAS EXHIBIT "27."

Bk. 5. Folio 360.
5/11/01. Sold to order A. R., notify H. W. Gordineer, Troy, N. Y. Weighed by T A B.

Draft. 250 bags Pr Timothy. Weight 32685. $1310.96
Stock Mark R, circle, SZ. 250 Bags 32935-250 32685.
Less allowance and Bags.... 36.25

1310.96
Less freight 99.79

1211.17
A&A Shipped by Red Line.

WITNESS (continuing): I entered the original order on page 644 in Book 4 and made out a bill for the order to go back to the office. That was in connection with some 250 bags of timothy to Schisler & Corneli, St. Louis, Mo. The entries are true and 114 correct. A draft was drawn on Schisler & Corneli on that date and deposited in the bank to Rodgers' account.

Page 644 marked for identification "Black Exhibit 36," introduced in evidence.

(Objected to for the same reason that the last exhibit was objected to.)

Said exhibit is as follows:

BLACK EXHIBIT "36."

Bk. 4. Folio 644.

1/31/01. Sold to Schisler, Corneli Seed Co., St. Louis, Mo.
Shipped by Wabash.
Draft 250 Bags Timothy. Weight 31540. $1413.93
Stock Mark R, circle, QX 250 Bags 31790-250 31540.
Naomi.

WITNESS (continuing): I made the original entry on page 28 of Book 5, in connection with the sale of 250 bags of timothy seed to Kirkpatrick & Co. Made the entries on March 28, 1901, also entered the amount with regard to the net weight. Took the amount from the lower part of the page. The usual course was pursued with reference to draft being made and placed in the bank to Rodgers' account.

Page marked for identification "Black Exhibit 37," introduced in evidence.

(Objected to for the same reasons the last exhibit was objected to.)

Said exhibit is as follows:

BLACK EXHIBIT "37."

Bk. 5. Folio 28.

Weighed by T A B. Billed 3/29/01.
3/28/01. Sold to Allen Kirkpatrick & Co., Pittsburg, Pa.
Draft. 250 Bags Pr. Timothy 31614. $1269.20.
Shipped by Penna. Co.
Div. B. Sec. 30.
Stock Mark B 30 R, circle, RK 250 Bags A&A, 19 Naomi, 31614.

WITNESS (continuing): I made the original and final entries on page 168 in Book 5; that is, I entered the order of 250 bags of

timothy seed to E. W. Conklin & Son, the party to whom the property was to go. That was a sale. The party was drawn upon and the draft deposited to Rodgers' account in the bank. I entered the net weight there, 31,794; obtained it from the lower part of
116 the page. The draft was drawn about April 10, 1901. I know nothing about whether this draft or any of the former drafts that I have testified to were ultimately paid or not. I keep the books of account with the bank. If they had not been paid would have had notice of it. Presume they were paid, that is all I know; they took the regular course.

Q. And if not paid they came back?

(Objected to as leading.)

A. Yes, sir.

Mr. ELSDON: I object to the question and answer with reference to the payment, and move that it be stricken out, on the ground that it is immaterial and irrelevant.

Page 168 introduced in evidence as "Vaas Exhibit 28" and called attention that Clements testified as to this page.

(Objected to for the same reasons that the other pages were objected to.)

Said exhibit is as follows:

VAAS EXHIBIT "28."

Book 5. Folio 168. Billed 4/9/01.
4/9/01. Sold to E. W. Conklin & Son, Binghampton, N. Y.
Shipped by Lac.
Draft. 250 bags Pr. Timothy. Weight 31794. $1276.22
Stock Mark R, circle, SS. 250 bags 31794 net.
Naomi.

117 WITNESS (continuing): The entries on page 376 in Book 5 were made under an order for a car of timothy from Allen Kirkpatrick on May 6th. I made the entries in the upper half of the page with regard to the sale, the amount, etc., all except the location after the word "stored." I entered the word "stored 5/7." Got the figures 29341 under "net weight" from the lower part of the page. A draft upon Kirkpatrick was made in the usual
118 course of business and deposited in the bank to Rodgers' account.

The page introduced in evidence as "Vaas Exhibit 29" and attention called that Clements testified as to this page.

(Objected to for the same reasons that the last exhibit was objected to.)

Paper is as follows:

VAAS EXHIBIT "29."

Bk. 5. Folio 376.
ick. 5/6/01. Sold to A. Kirkpatrick & Co., Pittsburg, Pa.
Stored 5/7, 2 E 6. Weights.
Draft 250 bags Timothy. Weight 29341. $1121.87

119 WITNESS (continuing): I made the entry for the order and final entries on page 633 in Book 4. By "order" I mean the party to whom it was addressed, and the number of bags and shipping directions, and description of the seed, and figures as to the prices charged. I entered the net weight, 30,742 pounds. Made the entries in the ordinary course of business of the sale of seed to Isaac Davis, the last of January, 1901. A draft was made on Davis for the amount, $1,501.16, and deposited in the bank to Rodg-
120 ers' account. When these drafts were deposited in the bank they were not always deposited by themselves, but along with other checks or deposits of Rodgers'.

Page 633, marked for identification "Black Exhibit 38,," introduced in evidence.

(Objected to for the same reasons the last exhibit was objected to.)

Paper is as follows:

BLACK EXHIBIT "38."

Bk. 4. Folio 633. Billed 1/29/01.
1/28/01. Sold to Isaac Davis, Findlay, Ohio. Shipped by PFW&C.
Draft. 250 Bags Timothy. Weight 30742. $1321.91
R, circle, Q.Z. 250 Bags. 30992-250 30942.
Clover, etc 179.25

Naomi. $1501.16

WITNESS (continuing): I made the entries in the upper half of page 873 of Book 4, marked for identification Exhibit 39. All except the car number after the words "shipped by" and initial. That was in connection with an assignment to Seel & Co. in March.

I got the net weight, 31,182, from the lower part of the page. A
121 draft was made as usual and deposited to Rodgers' account at or about the date mentioned on the page, March 15th.

"Black Exhibit 39" introduced in evidence.

(Objected to on the same grounds that the last exhibit was objected to.)

Exhibit is as follows:

BLACK EXHIBIT "39."

Bk. 4. Folio 873.
3/15/00. Sold to A. Seel & Co., Baltimore. Shipped by B. & O.
Draft. 250 Bags Timothy. 31182. $1283.53
Stock Mark, R. circle, RV. 250 Bags 31432-250 31182.
Naomi.

WITNESS (continuing): I made the entries on the 16th of March on the upper half of page 884 of Book 4, marked for identification "Black Exhibit 40," all except the shipping mark and car number. I got the weight, 31,519, from the lower part of the page. A draft was drawn on those parties, as usual. That was a sale to Kelly & Co., and the draft was deposited to Rodgers' account in the bank.

"Black Exhibit 40" introduced in evidence.

122 (Objected to for the same reasons that the last exhibit was objected to.)

Exhibit is as follows:

FOR IDENTIFICATION, EXHIBIT "40."

Bk. 4. Folio 884. Billed 3/18/01.
Weighed by T A B. Shipped by B. & O.
3/16/01. Sold to the Kelly Co., Cleveland, O.
Draft. 250 Bags Timothy. 31519 $1297.01
Stock Mark R, circle, SB. 250 bags 31769.-250 31519.
Naomi.

WITNESS (continuing): I made all of the entries on the upper half of page 654 in Book 4, marked for identification "Exhibit 41," except the shipping mark and date it was billed. That was in connection with the sale to Small & Co. at the date indicated. Got the net weight, 30,595, from the lower part of the page. A draft was made as usual for or including the amount indicated here and deposited in the bank to Rodgers' account.

"Black Exhibit 41" introduced in evidence.

(Objected to for the same reasons that the last exhibit was objected to.)

Said exhibit is as follows:

BLACK EXHIBIT "41."

Bk. 4, Folio 654.

Billed 2/4/01.
Weighed by T. A. B. Shipped by C&EI.
2/4/01. Sold to W. A. Small & Co., Evansville, Ind.
Draft. 250 bags Timothy. Weight 30595. $1443.62
Stock Mark R, circle, QR. 250 bags. 30845 - 250 30595.
A&A.

122½ WITNESS (continuing): I made the entries in the upper half of page 317, Book 5, on April 24th, on a sale of a carload of timothy to Conklin & Son. Got the net weight from the lower part of the page. A draft was made, and deposited in the bank, in accordance with our custom, for or including the amount here.

Vaas Exhibit 30 introduced in evidence and objected to for the same reasons the last exhibit was objected to.

Said exhibit is as follows:

VAAS EXHIBIT "30."

Bk. 5. Folio 317.
4/24/01. Sold to E. W. Conklin & Son, Binghampton, N. Y.
Shipped by Lac.
Draft. 250 bags Timothy 30226. $1139.50
Stock Mark. 3, D, 5, R, circle, S. V. 250 bags, 30226.
Amer. & Amos.

WITNESS (continuing): Rodgers' notes to the bank, called discount notes or loans, were also deposited in the bank as a part of his commercial paper.

Cross-Examination by Mr. Elsdon.

123 I was the book-keeper for Rodgers. Had nothing to do with shipping out the goods or with making a sale of goods that were sold at Rodgers' place. My duties were simply confined to the office on the books. When I say, as I have here in a number of cases, that those entries were made with reference to a sale of seed sent to different parties, I am basing my evidence on information I got from the direct orders from the parties. These or-
124 ders, when received, I entered in these books. I understand that to be an actual sale. As to whether those goods were actually shipped to the parties and the sale consummated, I don't know about that of my own knowledge. Rodgers had only one

account in the bank. When I referred to these several pages being original entries, I meant that there is no other entry prior to this entry here in the course of business. I said I took some of those weights and some of the data when I entered on those pages from these memorandum slips.

Q. Then there was an original entry prior to the making of this book? A. Not of the sale.

WITNESS (continuing): There certainly was in reference to some of the data referring to the sale. These weights I knew nothing about myself; did not weigh the goods; either took them from the figures lower down on the page or from these memorandum slips in evidence. Had nothing to do with the making up of the weights on the memorandum slips or on the bottom of the page.

125 So far as the sale is concerned this is a page of original entry. That is, this is the first entry made of what I suppose was the sale, so far as the order is concerned. There is nothing on any of these pages to show the actual shipment of the goods. When I refer to these entries as being true and correct, I used those words with reference to the fact that an order was received and that I filled out this blank in part by taking the weights from lower down on the page or from those other slips, and in that way figuring the total amount of the sales. I consider it correct as far as the data is concerned, and the billing; that is, I know it is correct so far as my copying of the amount of the net weight, for instance, is

126 concerned. I know of my own knowledge that the weight was correct, because I checked over the figures, but I don't know that the goods that were entered there on those different pages actually weighed that amount; so when I refer to the figures of weights as being made by me I refer simply to the fact that I copied those figures from somewhere else. As to page 376, Book 5, I got the information that the goods were stored, from which I made the entries on that page, from the storage slip. Don't know anything personally about whether those goods were stored or not. That is a sale slip, so-called. Of course that is the idea of a sale. Sometimes a car being received was stored by Rodgers as a warehouseman for a while and afterwards shipped. That is, a sale would be made and we instructed to retain it in storage for account

127 of the person for whom we sold it, but my knowledge in reference to that matter is no greater than as to the orders received.

Re-direct Examination by Mr. Wyeth.

Referring to page 376, I testified that Kirkpatrick had been drawn upon. He settled with Rodgers, according to that account.

Q. That is, this draft was paid?

(Objected to as immaterial and irrelevant.)

A. I know nothing to the contrary.

Q. Explaining a moment ago, on cross-examination, as to what you meant by true and correct entries and what you know about them, you spoke of taking the order that the party sent in and making certain entries in the book. The weights you get from the sources you have mentioned, and in stating that the accounts are true and correct do you take into consideration or not that drafts drawn on these various parties were paid by them; just whether you take that into consideration or not?

(Objected to as assuming the drafts were paid when there
128 is no evidence to that effect.)

A. I include all that except this. I know the draft was deposited to Rodgers' account, and Rodgers' account credited with the amount. Whether the draft was paid is something I can't tell.

WITNESS (continuing): I don't know of any cases that I have testified to to-day where the draft has been returned unpaid. Had an account with the bank also to look over and keep in my books. Where a draft is returned as not paid, the bank informs us of the fact that the draft is to be taken up, and then it is paid by a check of Rodgers' and taken up and attended to in some way. During
the time I was book-keeper I drew the body of the checks and
129 drafts. The red ink item 89.51 in the right-hand column in Vaas Exhibit 3 indicates that the account was overdrawn at that time that amount. The same is true of the entry 413.05 in Vaas Exhibit 4.

Re-cross Examination by Mr. Elsdon.

There were instances where drafts were returned unpaid in Rodgers' business, possibly half a dozen, I would say, from January 1st to May 1st. Don't remember in just what cases those were returned, but think the case of Gordineer was one. He was one of these to whom a shipment was made. I would certainly remember
it if any of these drafts had been returned dishonored or un-
130 paid. It would not be possible for any of these drafts to be returned dishonored without my knowing anything about it. The bill of lading was always attached to these drafts. When I

say it would be impossible, I mean it would be actually impossible. The bank would inform us at once; I would be informed of the fact.

I would certainly find it out, would certainly know. I had
131 had in these cases instances in which the draft came back.

Cannot remember all of them. Gordineer is a special case, because he is peculiar that way; he would not pay a draft unless he had permission to inspect it. Have made no search through the books with reference to this matter of dishonored drafts with a view of testifying here to-day.

Re-direct Examination.

Referring to the Gordineer matter, payment was refused until he could inspect the goods. The draft was returned to the bank and the bank called on us for a check for the amount. We redeposited the draft and it went through again and he paid it.

NOVEMBER 11, 1901.

ALEXANDER RODGERS, sworn on behalf of the trustee, examined by Mr. Wyeth, testified as follows:

133 Am the bankrupt in this case. I suppose my financial condition was about the same on May 8th last as during the four months before, except I was not quite so short for money during the four months. I could not tell you how much I owed and
134 how much my assets were on the 7th or 8th of January, four months prior to May 8, 1901. I cannot answer the question as to what was the difference, and what I know about the difference, between my condition January 7th or 8th and May 8th, I would only be guessing at it. I cannot state, would not say
135 the amount of my assets January 7th or 8th last, and the amount of my indebtedness at that time, without the records. I did know then about what my assets were, but I don't know now. Cannot tell what was the amount of my indebtedness January 7th or 8th last. Did not charge my memory with it. That is a long time ago. I knew at the time, but I don't know now.

Q. Can you state whether January 7th or 8th last your indebtedness exceeded your assets at that time?

(Objected to as calling for the conclusion of the witness and asking the witness to guess.)

A. I don't think they did.

Q. I will ask you whether your debts on January 7th or 8th last exceeded in amount the assets that you owned and had?

(Objected to for the reason that the witness has already stated that he did not know what his debts were and what his assets were at that time.)

A. Taking Mr. Patten as one of my debtors, of course I
136 owed more than my assets, I expect.

WITNESS (continuing): Was indebted $25,000 at that time to Patten. I don't know whether the indebtedness to Patten from that date in January continued the same or increased or diminished up to May 8th. Would like to correct my answer about indebtedness to Patten. My books will show exactly. It might be it was $30,000, am not certain about it, either $25,000 or $30,000. Don't think I borrowed any more money of Patten after November, 1900. I did know the amount of assets I had at that time substantially; don't know now. It consisted of seed and machinery at my place on Johnson street. My assets, including seed and machinery,
137 which I had on hand January 7th or 8th last diminished down to May 8th, cannot state how much, even approximately. My books do not show any inventories of property, do not name business, in January. We took stock on January 1, 1900. Used to take stock every month for my own information, of which there was no particular record kept, so that I had an idea every month how things ran. Cannot state as to the market price of seed in January, 1901 and after up to the time of my failure, as compared with the market price in November, 1900, and up to January 1st, whether it increased or decreased in the market. The records will show that.

Q. How was the market price in 1901 up to the time of the filing of your petition in bankruptcy as compared with the market price immediately prior to January 7, 1901, and as far back as November, 1900?

(Objected to as immaterial.)

A. I think it was lower.

Q. Can you state when the market price began to decline,
138 if it did decline, in that period from November 1, 1900, up to the time of your failure?

(Objected to as immaterial.)

A. I think it began to decline along in November, and it kept up to May.

Q. Are you able to state how material the decline was up to January 8th as compared to what the price was in the fall of 1900?

(Objected to as immaterial.)

A. Half a dollar a hundred.

WITNESS (continuing): Think I purchased seed on and after January 7, 1901, up to the time of the filing of the petition in bankruptcy in excess of the amount I sold and disposed of during
139 that period. From January 7th to May 8th I bought more than I sold, but cannot state just how much. Had no assets outside of my business there, seed and machinery, and the money on hand in bank that I did business with.

Q. (By Mr. Paden): Can you state of your own knowledge whether your total indebtedness on or about January 8th exceeded your total assets, that is, including in your indebtedness all that you owed to Mr. Patten, without giving specific figures?

(Objected to as asking for a conclusion instead of specific facts, and as immaterial.)

A. I don't think that my liabilities were more than my assets.

WITNESS (continuing): My books would not show in January.

Q. When you ceased doing business as the Illinois Seed Company, or ceased your connection with that company and went into business for yourself, did you make any statement of your
140 condition to the officials of the First National Bank of Chicago?

(Objected to as immaterial.)

A. Yes, sir.

Q. Did you make any written statement to them, do you know?

(Objected to as immaterial.)

A. I don't believe I did make any written statement, and still I might.

Q. State whether or not you made a statement to any of the officers of the bank as to your borrowed capital and from whom it came?

(Objected to.)

A. Yes, I did; to Mr. Hoge.

Q. What did you state to him in reference to that?

(Objected to as immaterial.)

A. I told him exactly my condition, that I had been loaned this money by James A. Patten.

WITNESS (continuing): I told him how much. Patten is still one of my creditors.

Cross-Examination by Mr. Peckham.

141 Am sure that I mentioned Mr. Patten's name to Mr. Hoge. Did not mention it to any of the other officers. No one ever asked me any questions. In mentioning it to Hoge I did not mention it confidentially. I had no reason why any one should not know that Patten was my creditor and that he was advancing me money and that I was doing business with him.

Re-direct Examination by Mr. Wyeth.

The schedule attached to the petition in bankruptcy which I filed on May 8th states that the amount of my indebtedness at that time was $63,833.19. I did not borrow within the four months preceding that, for use in my business or otherwise, any money from any other than the First National Bank and H. W. Rogers & Bro., and that schedule also states that my stock in trade was $30,000. That was my estimate, or judgment, when I filed my petition.

142 Q. Now, was there any material increase or decrease in the price of seed and such material as you had in hand constituting your stock in trade from and after January 8, 1901, up to May 8, 1901, and, if so, how much?

(Objected to as having been over it with this witness, and because the witness has stated he was unable to answer, and because it is immaterial.)

A. I think there was a decrease in value of stock.

WITNESS (continuing): Cannot tell how much, except I think about half a dollar a hundred on timothy seed. On clover and Hungarian and millet the market was about the same.

Re-cross Examination by Mr. Peckham.

I don't know why what I owe to Mr. Patten should not be counted among my indebtedness. Don't know why I said that I counted what I owed him among my indebtedness. He loaned

143 me that money to do business on. I had also told my creditors that I was doing business with the money borrowed from him; told Bradstreet's Mercantile Agency that. When Bradstreet's came around I answered their questions. I didn't say to them that they should keep anything out, and I mentioned Patten's name to them. Patten never asked me to keep his name quiet. If Bradstreet's did keep his name back and didn't give it out in connection with my affairs, I don't know why they did it.

Cross-Examination by Mr. Elsdon.

I made no arrangement whatever with Patten at the time he advanced this $15,000 to me to do business with. I was to pay him a certain rate of interest on it. He was to have no interest in the business, or in the profits in any way. I had money
144 of him that I paid some back, but I don't think it applied to the $15,000. I think I borrowed enough additional to offset what I paid back to him, so that no part of the $15,000 has been paid back. I don't know, but I believe my petition correctly shows the fact in reference to that. The statement in my schedule with reference to the amount due Patten reads as follows: "Mr. James A. Patten, Evanston, Illinois. About January, 1899, and since that date, notes and open accounts, together with interest due thereon, aggregating in all about $33,700." I borrowed more money of him after the $15,000. I think I gave Patten a note at the
145 time I borrowed this money. I am sure of that. I don't think I gave him notes when I borrowed additional sums after that. Don't think there was any specific time agreed upon when I should pay those additional sums. I didn't give him, nor was there any arrangement whereby he was to have security for this money or any of these loans that I have made of him; he loaned them to me without anything except my note of hand, and I think I am pretty sure that I gave him that note for $15,000, the original loan. I think it was made payable in one year. There was no agreement made at the time he loaned the $15,000, as to any extension of time for the payment of the $15,000, beyond the one year. Mr. Patten did not have, nor did I have credited up to him on my books any portion of the profits of the business. I kept an account with him on my books.

Q. What rate of interest were you paying Mr. Patten, taking in the whole four months?

146 (Objected to, because the notes will show, and the notes are on file in this case.)

A. Am not certain whether five or six per cent.; I think six.

WITNESS (continuing): It is not a fact that I was paying him interest on this amount as his share of the profits in this business. Was doing business during this four months in the same way that I had prior to that time. There was no change apparent in the condition there or in my method of doing business.

November 19, 1901.

EMIL VAAS, recalled on behalf of the trustee, examined by Mr. Wyeth, testified as follows:

147 As to the books which have been brought in here this morning, the first is the ledger. This is a journal cash, and this a
148 petty cash, marked No. 1508. That is the Title & Trust Company's number. That is the cash book so marked on the side. The book marked on the back is a journal; what I referred to was the general cash, marked "Cash" and "Alexander Rodgers" on the back, and the ledger is marked "Ledger." The book now shown me is called a purchase book, and that is marked "Purchases" on the side, with a letter "A" on the back. The book marked "4" on the back is one of the sales books, and the one marked "5" another. These two sales books are the ones from which I testified. This is a stub check book from No. 1590 to 2589, the numbers of the checks. The first date in them is April 16, 1900, and the last
149 is March 20, 1901. This other book shown me is the last check 2590 to 3589, dated from March 20th to May 7, 1901. That contains stubs and a lot of unused checks. The last number of check used there is 3725. These books that I have identified were used in Rodgers' general seed business from the time I was book-keeper. I kept these books from the time I was book-keeper. These constitute the complete set of books covering the business of Rodgers and kept by me, with the exception of a small inventory book. I made no use of the inventory book; that was of a prior date. Am acquainted with these books from October 1, 1900, to the date of the closing of business May 7, 1901. When I came
150 to Rodgers, entries had been made in these books by some person designated by him, but all entries had to be checked over by me from the 1st of October until January 1st, so that I thereby became partly responsible for the entries made in the books from that date, October 1st, to the last of December. I went back to October 1st because I found no trial balance later than September 30th, made up after that date, so that I checked up from that date, October 1st, until the time that I entered upon the keeping of the books, which was January 2, 1901. These books show in a general way the daily transactions of the business of Rodgers in the seed line, and showing the standing or state of his business every day during that period. As a set of books kept in connection with his business, they show the complete condition and the trans-
151 actions of Rodgers.

Q. All entered up in this way?

(Objected to as leading.)

Q. Well, is that what you mean?
A. That is what I mean by state of the condition.

((Objected to and motion to strike out by all the parties.)

WITNESS (continuing): I kept these books up until Rodgers' failure. Put items in them myself the 8th of May; worked at them until the 10th of May for the purpose of closing up the books and getting at the final trial balance and completing the entries. In the course of book-keeping in the seed business it was customary to make monthly trial balances, closing up each account monthly
152 and getting the balances for and against, or liabilities and assets, in order to see where we are standing. I made such statements always at the beginning of the new month; the first day of the month I started in making up the balance so that we could know what it was. The last balance I made just about the days of the failure. Would always bring the balances down to and including the last day of the month.

Q. Will you state whether or not these books contain true and correct statements of the business and transactions of Alexander Rodgers, seed merchant, during this period that you mentioned, from October 1st to the close of business by the failure?

(Objected to for the reason that there has been no foundation laid for it.)

A. The books contain an accurate description from day to
153 day of the business that Rodgers transacted.

(Motion on behalf of all the parties to strike out the answer as not responsive to the question.)

WITNESS (continuing): These trial balances were made out on separate sheets of paper. The paper handed me is a trial balance made for the business closing October 31, 1900.

Paper was marked "Trustee's Exhibit 1."

WITNESS (continuing): It is made up from the ledger. The trial balance contains the exact footings in the ledger; that is, by deducting the debit from the credit side, making up the balance. This as prepared by me contains a correct transcript showing the balance shown in the ledger down to and including this date
154 of October 31, 1900.

Paper marked "Trustee's Exhibit 1" introduced in evidence.

(Objected to as incompetent, immaterial and irrelevant, and not tending to sustain any issue on this hearing.)

Said paper is as follows:

TRUSTEE'S EXHIBIT 1.

Trial Balance—December 31, 1900.

A	2	Alex Rodgers	1054.70	
L	8	Expenses	1511.90	
A	15	Storage		238.07
A	16	Machinery & Fixtures	2329.57	
A	18	Insurance		82.02
A	23	Red top	271.50	
A	24	Orchard grass	211.96	
A	27	Timothy	16302.38	
A	28	Clover	6083.18	
A	29	Bags	1086.16	
L	30	Cartage	45.52	
L	31	Exchange	291.33	
L	35	Bills pay'ble		22000.00
L	36	Interest	478.21	
L	46	Payroll	3154.29	
L	48	Traveling Expenses	65.85	
L	49	First Nat. Bank		286.08
A	63	Hungarian Millet	654.15	
L	67	Buckwheat		148.80
A	73	Petty cash	37.97	
A	77	Blue grass	398.76	
L	82	Warehouse expenses	2278.68	
A	86	Peas	284.68	
A	93	Merchandise	692.39	
L	346	Profit & Loss	12444.25	
L	350	Pames A. Patton		32009.50
L	352	D. W. Zimple		12.50
A	355	Leo Sachs	70.13	
A	357	Office Furniture	452.20	
A	357	Expense acc't	99.95	
L	361	J. F. Leising		21.33
L	363	McColluch & Sons		8.38
A	364	Henry Bloch	375.20	
A	454	Membership B'd Tr'd	2000.00	
A	454	A. Reichstrom	30.00	
A	455	Simpson A Co	58.50	
A	456	Clement's Team'g Co	24.26	
A	456	S. G. Conteen	2000.00	
			54787.68	54787.68

WITNESS (continuing): This trial balance was made by me in connection with my duties, and in the usual course of my duties as book-keeper for Rodgers. This left-hand column here of Nos. 2, 8, etc., refers to pages of the ledger. I drew up in the ledger regular balances and footings, concluding the showing of the ledger down to and including the 31st of December.

Q. Looking at Trustee's Exhibit 1, and taking the items beginning with the first, state what each item shows with regard to its being an asset or otherwise of the business of Alexander Rodgers; that is, explain in your own language the meaning of the balance shown either on the debit or credit side?

(Objection by Messrs. Elsdon, Peckham and Kerr, on the ground that the paper speaks for itself, and also for the
155 further reason that it is not shown that these items are correct, and the evidence of this witness with reference to the matter is incompetent and immaterial, and that it is not an original entry, and the books themselves will show whether or not it is correctly transcribed, and the books are the best evidence of that fact.)

A. The first item, Alexander Rodgers, being $1,054.70 in the debit column, shows that he is indebted to the business in that amount. It is a liability. The second item is expense, shows that $1,511.90 in the debit column is a liability. Storage, in the credit column, $238.07, shows an asset which is in money for storage due. Machinery and fixtures, $2,329.57, shows an asset. Insurance, $82.02, shows an asset; a rebate of insurance allowed. Red top orchard grass, timothy, clover and bags show an asset for their respective amounts. Cartage shows a liability. Exchange shows a liability. Bills payable a liability. Interest a liability. Pay roll and traveling expenses a liability. First National Bank a liability. Hungarian millet and buckwheat a liability. The First National Bank item is a liability; it is overdrawn. Buckwheat shows a liability. Petty cash, blue grass, shows an asset. Warehouse expense
a liability. Peas and merchandise an asset. Profit and loss a
156 liability. James A. Patten and Zimple, a liability. Leo Sachs
an asset. Office furniture and suspense account, assets. Leising & McCullough, a liability. Henry Block, membership Board of Trade; Reichstrom, Simpson, Clements Teaming Co. and S. H. Conteen, show assets. I called the Alexander Rodgers item an asset. All accounts owing to the business, no matter by whom they
are owing, are assets. It was owing by Rodgers. The profit
157 and loss item of $12,444.25 is a liability. It is a closing up of the balance of the year; that is, when the inventory is taken and the amount ascertained of profit and loss on which is made a list

of the business transactions, the balance that is lacking one way or the other is called a profit and loss item. This item was not made by me, it was taken from the ledger. That comes from the ledger from a prior date, from the 1st of June or July, 1900, and carried forward. Business was on the failing side $12,444.25. That is not represented in the business by any money or property. The second item at the top of the page, "Expense," is debited $1,511.90.

(It is understood that all the evidence as to trial balance goes in subject to objection already made at the commencement of his evidence with respect to trial balances, on behalf of the various parties.)

WITNESS (concluding): Expense is a liability because it is money paid out, and there is nothing to show for it in the business. There is not on deposit anywhere or any place belonging to the office that amount of money; but it has been used, we cannot get it back in any way, shape or form. It is the same with cartage, with exchange, with traveling expenses and warehouse expenses. These
158 things you cannot get back, they are money that has been paid out, that has irretrievably gone from the business. They are carried along in this way until you make up a statement of the condition of the business, and then they are transferred to profit and loss usually. I didn't close up the books and strike a balance sheet so as to carry matters to the profit and loss account during that period.

(Motion on behalf of First National Bank, Rogers & Bro., and National Storage Company to strike out the evidence of the witness as to this subject, and the exhibit itself, on the ground that his testimony falsifies the exhibit. It shows that it is not what it purports to be.)

Counsel for the trustee states that the oral testimony of the witness is offered in explanation of the trial balance sheet as to items which do not, perhaps, explain themselves, and that the ledger and other books are here from which these items are derived in the trial balance.

WITNESS (continuing): The three other papers handed me, marked for identification Trustee's Exhibits 2, 3 and 4, re-
159 spectively, are trial balances made up to the dates mentioned on each, in the same manner that I made the trial balance of December 31st, and are correct transcripts from the ledger, made in the same manner that I have testified to as to Trustee's Exhibit 1. The explanation of the items therein contained as I have given them in reference to Trustee's Exhibit 1, applies also to these three

Exhibits 2, 3 and 4. They were made up in connection with my duties and in the regular course of my business as book-keeper.

The three exhibits introduced in evidence.

(Objected to for the same reasons that Trustee's Exhibit 1 was objected to, and said parties also move to strike out the evidence relating to these three exhibits for the same reason that they moved to strike out the evidence as to Trustee's Exhibit 1.)

Documents are as follows:

TRUSTEE'S EXHIBIT 2.

Trial Balance—Jan. 31, 1901.

A	Alex Rodgers	1087.19	
L	Expense	1731.82	
A	Machinery & Fxtrs	2333.07	
A	Storage		243.19
A	Insurance		82.02
A	Red top	2704.83	
A	Orchard grass	211.96	
A	Timothy	15620.98	
A	Clover	3896.16	
A	Bags	1181.35	
L	Cartage	113.60	
L	Exchange	342.23	
L	Bills payable		22050.00
L	Interest	589.42	
L	Pay roll	3673.87	
L	Traveling Expenses	65.85	
L	First Nat. Bank		4339.65
A	Hungarian & Millet	1983.19	
A	Buckwheat	2532.36	
A	Petty cash	33.71	
A	Blue grass	793.19	
L	Wareh'se Expenses	2784.29	
A	Peas	274.05	
A	Mdse	823.65	
L	Alsike		555.94
A	Sundry persons	3048.68	
L	Profit & Loss	12444.25	
L	James A. Patton		32009.50
A	Leo Sachs	70.13	
A	Office Fixtures	452.20	

L		Suspense		.93
L		Leising		2.33
L		McCollough & Sons		8.38
A		Henry Bloch	375.20	
A		Board of Trade	2000.00	
A		A. Rhiecstrom	30.00	
A		Clement's Teaming Co	24.26	
A		Glaser, Kohn & Co	31.89	
A		Dickinson & Co	15.60	
A		A. Shefner	22.96	
			61291.94	61291.94

TRUSTEE'S EXHIBIT 3.

Trial Balance—Feby. 28, 1901.

			DR.	CR.
A	2	Alex. Rodgers	1112.19	
L	8	Office Expenses	1877.74	
A	15	Storage		261.50
A	16	Mach'n'ry & Fxtrs	2333.07	
A	18	Insurance		44.67
A	23	Red top	2692.21	
A	24	Orchard grass	201.84	
A	29	Bags	1472.24	
L	31	Exchange	410.88	
L	33	Bills payable		29500.00
L	36	Interest	711.44	
L	46	Pay roll	4205.11	
L	48	Traveling Expenses	69.58	
L	49	First Nat. Bnk		3986.71
A	63	Hungarian & Millet	553.17	
A	67	Buckwheat	2013.48	
A	73	Petty cash	37.31	
A	77	Blue grass	731.14	
L	80	Cartage	226.11	
L	83	Wareh'se Expenses	3107.78	
A	86	Peas	452.52	
A	93	Mdse	1106.89	
L	96	Alsike		970.24
A	98	Alfalfa	48.07	
A	102	Timothy	16672.73	
A	108	Clover	4943.60	
L	112	Lawn grass		10.25
A	300	Sundry persons	6350.04	
L	346	Profit & Loss	12444.25	

L 350	James A. Patton		32009.50	T
A 355	Leo Sachs	70.13		
A 357	Office Furniture	452.20		
L 361	J. F. Leising		2.33	
L 363	McCollough & Sons		8.38	
A 364	Henry Bloch	375.20		
A 354	A. Rhinestrom	30.00		
A "	Board of Trade Mmbrshp	2000.00		
A 354	J. F. Zahn & Co	20.86		
A "	Clements Teaming Co	24.26		
A 456	Glaser, Kahn & Co	31.89		
A 457	A. Dickinson & Co	15.60		
		66793.53	66793.53	

TRUSTEE'S EXHIBIT 4.

Trial Balance—March 31, 1901.

		DR.	CR.
A	Alex. Rodgers	1160.65	
L	Office Expense	1977.37	
A	Storage		295.72
A	Machinery & Fxtrs	2333.07	
L	Insurance	51.34	
A	Red top	2595.88	
A	Orchard grass	167.46	
L	Exchange	463.93	
L	Bills payable		26100.00
L	Interest	767.66	
L	Pay roll	4875.33	
L	Traveling Expenses	145.87	
L	First Nat. Bnk		279.57
A	Hungarian & Millet	1517.86	
A	Buckwheat	1998.62	
A	Petty cash	70.20	
A	Blue grass	389.48	
L	Cartage	384.99	
L	Warehouse expense	3606.99	
A	Peas	327.63	
A	Mdse	913.43	
L	Alsike		660.68
A	Alfalfa	86.21	
A	Timothy	15083.76	
A	Clover	3281.19	
L	Lawn grass		32.83

A	Bags	1107.88	
A	Sundry persons	708.65	
L	Profit & Loss	12444.25	
L	James A. Patton		32009.50
A	Leo Sachs	70.13	
A	Office Furniture	452.20	
L	J. F. Leising		2.33
L	J. M. McCullough & Sons		8.38
A	Henry Bloch	375.20	
A	Alex. F. Glasgow	94.42	
A	Board of Trade Membrshp	2000.00	
A	A. Rhinestrom	30.00	
A	J. F. Zahm	20.86	
L	Isaac Davis		145.39
A	Glaser, Kohn & Co	31.89	
		59534.40	59534.40

WITNESS (continuing): I made up two trial balances after this one of March 31st, one for April 30th and one for May 7th, and handed them to the custodian of the Title & Trust Com-
160 pany. I have been among the papers and books of Rodgers' at the Title & Trust Company's office to look for these statements and did not find them. I found these that have been introduced in evidence, and made up from each of these balances introduced a statement of the assets and liabilities in accordance with this verbal statement which I have given. But they speak
161 for themselves. The letters "A" and "L" at the left of Trustee's Exhibit 1, placed at the left of several items, indicates assets and liabilities; A for asset, and L for liability, according to the letter.

Witness takes the three Trustee's Exhibits 2, 3 and 4 and marks the letters "A" and "L" at the left of each item, as indicating asset or liability, upon request of trustee's attorney.

(Objection to the witness mutilating the sheets.)

Cross-Examination by Mr. Elsdon.

This inventory book which I speak of was a book which I had nothing to do with, that is, I made no entries in it. It was made up from the actual seed in the house. It was not a matter of
162 book-keeping. It shows only the seed and bag account, whatever seed was in the house. The assets of furniture and machinery and fixtures remain stationary in the ledger until the end

of the year. I know something about the correctness of the entries in the books that I checked up to January 1st prior to the time when I went there, because I took up every item, went back to the books of original entry and checked off every item that was entered in the books. Don't know whether the items that were entered there were correct at the time when they were entered. That is not true with reference to the entries made by me after I went there and kept the books. In reference to the items shown by this first trial balance, Trustee's Exhibit 1, I know that the accounts as they were made up from the purchase book and sales book were transferred correctly into the cash book, but I had nothing to do with
163 making the sales during that period. After that I had. I made up statements of all sales made and purchases. I mean by that that when an order came in I made the entries that have been referred to in my former testimony. But as to the correctness of the weights, and the fact as to whether the goods were sold or not, I don't pretend to know anything about that. These items with reference to seed and red top and orchard grass, timothy and clover, showing these balances in the trial balance, refer to the amount paid for the seed and the amount received for the seed sold, or were the balance between the two; that is, difference between the cost price and the sale price. I know that these are the actual selling prices and actual cost prices, because seed sold by sample or at the rate current on the Board of Trade during the day each day that the sale is made up. The price on the Board
164 of Trade varies even in a day, but not after eleven o'clock. Any trade that is changed, or any trade that is made on the Board is subject to the rules of sales of the Board of Trade governing the sales and purchases. We received the prices from the Board of Trade on a card. You can't buy prime seed, for instance, on the Board of Trade above or below a certain figure, the figure that is made on the Board of Trade during the hours of business, which change, of course, in the seed line, and about eleven o'clock or half-past eleven. The prices do not vary after the close of the Board of Trade, but do before the close of the Board; so that if a sale is made early in the morning, say ten o'clock, and another at eleven, those two prices will vary considerably. All trades made before ten, all trades made before eleven, are governed by the day preceding. I had nothing to do with making the sales on the
165 Board of Trade. I can only tell by the record of the Board of Trade sales that I have what the price was at which a certain amount of seed was sold; cannot tell personally. The book of Rodgers' that I call the ledger is not a book of original entry, but a book of final entries, and the entries put in there are taken from other books, from the cash and journal and check books.

When I say that according to the trial balance there are certain assets and liabilities, I am making that statement from the entries in the books of the business. Don't pretend to know what there may have been outside of the books in the shape of assets, simply the entries that the books show, and this item of profit and loss I called a liability, although it shows on what would ordinarily be called the asset side of the trial balance. The profit
166 and loss account includes expenses of the business; warehouse expenses, office expenses, cartage, storage paid out, insurance, exchange and interest, and the loss in buying and selling of the seed, as well as loss sustained by decrease in the value of machinery, fixtures, etc., and office furniture and fixtures; in fact, all losses incurred and all profits made in the business. The fact that there was a balance on the debit side of the profit and loss account would not always necessarily indicate that the whole business was conducted at a loss. The balance in reference to the red top and the different kinds of seeds in these different other balance sheets varies from month to month and from day to day.

JANUARY 15, 1902.

FURTHER EVIDENCE SUBMITTED ON BEHALF OF THE TRUSTEE IN REBUTTAL.

167 Trustee introduced in evidence from the claim docket of the referee, page 43, the claims that have been filed and allowed against the estate of Rodgers, amounting to the sum of $35,190.04, and other claims on file, aggregating some $1,200, which appear not to have been further passed upon than the
168 filing of the same. Included among said claims so allowed is the claim of James A. Patten, allowed for $33,633.53.

W. W. WILSON, recalled on behalf of the trustee, examined by Mr. Wyeth, testified as follows:

Am a lawyer and the attorney and representative in active business of the Chicago Title & Trust Company in this estate. Am able to state the amount of assets that the receiver or trustee, Chicago Title & Trust Company, has received and has in this estate, aside from the seed which was sold under order of court last August by the First National Bank.

Q. If so, go on and state.

(Objected to by all the parties as immaterial and irrelevant, but not on the ground of incompetency.)

A. They have received three thousand nine hundred and ninety-six dollars and some cents in cash.

Q. From what source did that come?

(Objected to on behalf of all the parties as immaterial and irrelevant, but not on the ground of incompetency.)

A. That came from the sale of fixtures and the sale of the seed in our possession and which was not claimed by other people or parties, and the collection of outstanding accounts.

WITNESS (continuing): All the property that came into our possession has been disposed of and converted into money, except the seed taken from us by the First National Bank and the National Storage Company. I refer to the seed taken out and sold under order of court. There are some uncollected accounts and 170 notes.

Q. What is the total face amount of those?

(Objected to by all the parties as immaterial and irrelevant.)

A. About $700.00.

WITNESS (continuing): We have a certificate of membership in the Board of Trade which is as yet undisposed of.

Q. What is the value of that, about?

(Objected to by all the parties as immaterial and irrelevant.)

A. I don't know what we can get for it; as to what can be realized for it, that is conjectural.

WITNESS (continuing): It is supposed to be worth about $2,500 to $3,000.

This amount which we have collected and put into money, and the uncollected accounts, and this membership, constitute all the assets remaining in the estate that have yet come into the hands of the Trustee. The expenses of the estate so far have been 171 about $1,500; that includes rent, custodian's fees, insurance and stenographer's fees, and leaves other expenses yet to be determined by the referee or the court, such as receiver's fees and receiver's attorney's fees, undisposed of.

Cross-Examination by Mr. Elsdon.

I didn't figure in that amount the amount that is due us now under the order of court recently entered as the balance of the proceeds of sale of the seed by the First National Bank. That amounts to at least $5,000, and the order of court was that the First National Bank should turn over to us $5,000. I understand there is a margin over and above that that the bank holds which will come to us on the final settlement, in any event. Don't know what uncollected open accounts there are; have not checked them up. I think I collected on open accounts about $400, which is
172 included in the $4,000 that I referred to. There are no other assets of the estate that I know of.

Re-direct Examination.

Aside from the proceeds of the seed sold by the First National Bank, which I have referred to, I know of no other assets to come to the trustee than those I have mentioned.

(Motion on behalf of First National Bank, Rogers & Bro. and National Storage Co. to strike out all the evidence of the witness as immaterial and irrelevant.)

The foregoing was all of the evidence submitted by any of the parties hereto in said cause.

399 And afterwards, to wit: on the 5th day of November A. D. 1902 there was filed in said cause a notice in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES

for the Northern District of Illinois,

Northern Division.

In the matter of Alexander Rodgers, Bankrupt. } In Bankruptcy No. 5810.

To Orville Peckham Esq., Messrs. Kerr & Kerr, Messrs. Heckman, Elsdon & Shaw, and Messrs. Gregory, Poppenhusen & McNab, Attys. etc.

You are hereby notified that in the matter of the judgment, order and decree entered in the above entitled cause on October 29th, 1902, the Chicago Title & Trust Company, trustee, intends to appeal, and James A. Patten also intends to appeal and to join in the said appeal of the trustee from said order, judgment and decree to the United States Circuit Court of Appeals for the Seventh Circuit, and that said trustee and James A. Batten will on Wednesday morning, November 5th, 1902, at 10 o'clock A. M., or as soon thereafter as the matter can be heard, appear before the Honorable Christian C. Kohlsaat, Judge of said District Court and file their petitions for appeal and assignments of error, and ask that the proper orders be entered allowing said appeal, and that the appeal bond of said James A. Patten be fixed by the Court etc. at which time and place you can be present in the said matters, as you may be advised.

Dated Chicago, Illinois, November 3rd 1902.

NEWTON WYETH
Attorney for Chicago Title & Trust Co., trustee.

JOSEPH E. PADEN
Attorney for James A. Patten.

Received a copy of the foregoing notice this third day of November, 1902.

ORVILLE PECKHAM
Attorney for First National Bank.
KERR & KERR
Attorneys for H. W. Rogers & Brother.
HECKMAN ELSDON & SHAW
Attorneys for National Storage Co.
GREGORY POPPENHUSEN & MCNAB
Attorneys for Frank E. Winans.

Endorsed: 5910 U. S. Dist. Ct. In re Alex Rodgers, Bankrupt Notice Filed Nov 5 1902 at 10 o'clock A. M. T. C. MacMillan Clerk. Newton Wyeth Atty. for Trustee.

400 And afterwards, to wit: on the 5th day of November A. D. 1902 there was filed in the Clerk's office a petition for appeal and assignment of error, in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES.

For the Northern District of Illinois.

Northern Division.

In the matter of Alexander Rodgers, Bankrupt. } In Bankrutpcy. No. 5810.

In the matters of the petition of the Chicago Title & Trust Company, receiver in bankruptcy, the petition of Frank E. Winans, the answers of the First National Bank of Chicago, of H. W. Rodgers & Brother, of the National Storage Company, and of James A. Patten, to said petition of receiver, the petition of the First National Bank of Chicago, as amended, the petition of H. W. Rodgers & Brother and the petition of the National Storage Company, and the answer as amended of the Chicago Title & Trust Company, as trustee in bankruptcy herein, and the answer of James A. Patten, filed to the said petitions, consolidated for hearing:

To the Honorable Christian C. Kohlsaat, District Judge:

Comes now the Chicago Title & Trust Company as trustee of the estate of Alexander Rodgers, bankrupt, by Newton Wyeth, its attorney, hereinabove named, and shows to the Court that it conceives itself aggrieved by the findings, order, decree and judgment made and entered herein on the 29th day of October, 1902, and it doth hereby appeal from said findings, order, decree and judgment, and from the whole thereof, to the United States Circuit Court of Appeals for the Seventh Circuit, and states that its reasons for said appeal are specified in the assignment of errors filed herewith, and it therefore prays that this appeal may be allowed, and that a transcript of the record and of the proceedings and papers, upon the said findings, order, decree, and judgment were founded, may, after due

authentication, be sent to the said United States Circuit Court of Appeals for the Seventh Circuit.

Dated at Chicago, November 3, A. D. 1902.

401 NEWTON WYETH,
Attorney for Chicago Title & Trust Co., Trustee in Bankruptcy.

402 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois.

Northern Division.

In the matter of Alexander Rodgers, Bankrupt. } In Bankruptcy. No. 5810.

In The Matter Of the petition of the Chicago Title & Trust Company, Receiver in Bankruptcy, the petition of Frank E. Winans, the answers of the First National Bank of Chicago, of H. W. Rodgers & Brother, of the National Storage Company, and of James A. Patten to said petition of Receiver, the petition of the First National Bank of Chicago, as amended, the petition of H. W. Rodgers & Brother, and the petition of the National Storage Company, and the answer as amended of the Chicago Title & Trust Company, as Trustee in Bankruptcy herein, and the answer of James A. Patten, filed to the said petitions consolidated for hearing:

ASSIGNMENT OF ERRORS.

Comes now the Chicago Title & Trust Company, as Trustee of the Bankrupt estate herein, by Newton Wyeth, its Attorney, and says that the order, jdugment and decree entered in this cause on October 29th 1902, as well as the findings entered therewith, is erronious, and against the just rights of it, the said Chicago Title & Trust Company as trustee as aforesaid, and it assigns the following errors intended to be urged and upon which it will rely in its appeal from the said order, judgment and decree, in the above entitled cause:

That the United States District Court for the Northern District of Illinois, Northern Division, erred as follows:

403 First: In finding that the Chicago Title & Trust Company, called Receiver in said finding and decree, had not on May 13th, 1901, at the time of its filing its petition herein, the right of

possession of the property designated in the answers of the National Storage Company, the First National Bank of Chicago, and H. W. Rogers and Brother.

Second: In finding that the National Storage Company was at the said date, namely, May 13th, 1901, and at the time of the filing of the petition in Bankruptcy herein, namely, May 8th, 1901, entitled to possession and had possession of said property.

Third: In finding that out of the proceeds of the sale of the property described in the petition of said trustee, then receiver, and the petitions of the said First National Bank and H. W. Rogers & Brother, sold by said bank, under order of the Court, the said First National Bank is justly and equitably entitled to be paid the sum of $9,854.15, with interest thereon at 5 per centum per annum accroding to the tenor of the promissory notes of the Bankrupt held by said Bank, and that said notes were secured by the Storage Warrants of said National Storage Company as set forth in said finding and decree.

Fourth: In finding that, out of the proceeds of the sale of the property described in the petition of the said trustee, then receiver, and the petitions of the said First National Bank and H. W. Rogers & Brother, sold by the bank, the said H. W. Rogers & Brother are justly and equitably entitled to be paid the sum of $5,000.00, with interest thereon at the rate of 5 per centum per annum according to the tenor of the promissory note of the Bankrupt mentioned in said petition of H. W. Rogers & Brother, and that said note was secured by the Storage Warrants of said National Storage Company as set forth in said finding and decree.

Fifth: In finding that the National Storage Company is
404 entitled to the sum of $14.99 for storage charges upon said property, namely, the seed described in said warrants set forth in the petition and answer of said National Storage Company, being the same property described and referred to in grounds of error numbered third and fourth herein above, and that said Storage Company has a preferential claim and lien therefor upon the said fund in the hands of the said First National Bank.

Sixth: In not finding, and adjudging and decreeing accordingly, that said National Storage Company had, at the time of the filing of the said petition in bankruptcy, namely, May 8, 1901, and at all times thereafter, no possession and no right of possession of said property named in the answer of said National Storage Company to the said petition of the said receiver, now trustee, and in the petitions of the First National Bank and H. W. Rogers & Brother, and the answers of said bank and said Rogers & Brother to said petition

of said receiver, as against the possession and rights of possession of the said trustee, then receiver.

Seventh: In not decreeing and adjudging that said First National Bank of Chicago, said H. W. Rogers & Brother, and said National Storage Company, and the said parties severally, are not entitled to any equitable or legal lien or preferential claim upon the said property received and sold by said First National Bank under the order of the Court of August, 1901, and that their said petitions and claims be dismissed.

Eighth: In not adjudging and decreeing that said trustee in Bankruptcy was entitled to hold and to receive said proceeds of sale remaining in the hands of said First National Bank, as a part of the estate of said Bankrupt, free and clear from the claims and demands of said First National Bank, H. W. Rogers & Brother, and National Storage Company, and each of them, so far as said three claimants and petitioners, and each of them, claim preferences in respect of the said fund, or that the same is security for their claims and demands.

Ninth: In not finding, adjudging and decreeing that, as to all that portion of the property, namely, the seed designated and described in the Storage warrants held by said First National Bank which the evidence shows had been removed and other seed substituted in the place thereof by the bankrupt prior to the institution of bankruptcy proceedings herein, said bank had no lawful or equitable right to the same as security, or lien upon the said substituted seed and the proceeds thereof, and no lawful or equitable right to be paid out of said proceeds of said substituted seed, being a part of said proceeds of sale in hands of said bank, the alleged claim and demand of said bank.

Tenth: In not finding, adjudging and decreeing that, as to all that portion of the property, namely, the seed designated and described in the Storage Warrants held by said H. W. Rogers & Brother, which the evidence shows had been removed and other seed substituted in the place thereof by the bankrupt prior to the institution of bankruptcy proceedings herein, said H. W. Rogers & Brother had no lawful or equitable right to the same as security or lien upon the same and the proceeds thereof, and no lawful or equitable right to be paid, out of said, proceeds of said substituted seed, being a part of said proceeds of sale in the hands of said First National Bank, the alleged claim and demand of said H. W. Rogers & Brother.

Eleventh: In not finding, adjudging and decreeing that, as to all that portion of the property, namely, the seed designated and de-

scribed in the petitions of said First National Bank and H. W. Rogers and Brother which the evidence shows had been removed and other seed substituted in the place thereof by the Bankrupt, prior to the insitution of Bankruptcy proceedings herein, said National Storage Company had no right, legal or equitable, to the same and the proceeds thereof for itself, said National Storage Company, and said First National Bank and H. W. Rogers & Brother, as
406 security for the claims and demands of the said three parties, or any of them,

Twelfth: In not finding, adjudging and decreeing that said First National Bank of Chicago, and said H. W. Rogers & Brother, and each of them, have a complete and adequate remedy at law against said National Storage Company for their respective claims and demands set forth in their said petitions, and in not dismissing their respective petitions and disallowing their claims and demands respectively for security and preference as alleged by them in their said respective petitions and answers.

Thirteenth: In not finding, adjudging and decreeing that said First National Bank of Chicago and H. W. Rogers & Brother had prior to the institution of bankruptcy proceedings herein received by way of payments of money and transfer of storage warrants from said bankrupt while he was insolvent unlawful preferences upon the indebtedness of said bankrupt to said bank and Rogers & Brother evidenced by the promissory notes of said bankrupt held by said bank and Rogers & Brother a part of which notes are those set forth in the said answer and petitions of the said bank and Rogers & Brother, which preferences, or any part thereof, said bank and said Rogers and Brother, respectively, have not surrendered to the said trustee and bankrupt estate and the effect of the enforcement of said transfers or preferences will be to enable said bank and Rogers & Brother, each as a creditor of said estate and bankrupt, to obtain a greater percentage of its debt than any other creditors of the said bankrupt estate, of the same class, and that the said petitions, claims and demands of said bank and Rogers & Brother should be dismissed.

Fourteenth: In ordering, adjudging and decreeing that said First National Bank retain out of the proceeds of the sale the sum of $9,854.15, with interest at the rate of 5 per centum per annum.

407 Fifteenth: In ordering, adjudging and decreeing that said First National Bank retain out of the said proceeds of sale the sum of $9,854.15, with interest at the rate of 5 per centum per annum thereon, and out of said proceeds pay over to H. W. Rogers & Brother the sum of $5,000.00, together with interest thereon at

the rate of 5 per centum per annum as found in said decree, and also pay out of the said proceeds the sum of $14.99 to said National Storage Company.

Sixteenth: In ordering, adjudging and decreeing that said Chicago Title & Trust Company as trustee pay all the costs of the said proceedings hearing of the said petitions herein, including the referee's fees and the cost of printing abstract.

Seventeenth: In approving and confirming the referee's report herein, except that portion thereof relating to the jurisdiction of the Court, and thereby in effect overruling each and all of the exceptions of the Chicago Title & Trust Company, trustee, being called receiver herein at the time of the filing of the said exceptions, except the said exceptions as to the recommendations in said report as to jurisdiction.

Eighteenth: In not sustaining the exception of said Chicago Title & Trust Company to the said referee's report wherein said referee found that the said bankrupt was not at date of filing his petition in bankruptcy or at date of his adjudication as a bankrupt in possession of the property mentioned in said answers of the National Storage Company, First National Bank and H. W. Rogers & Brother, and that the said receiver was not at said dates in possession, and has not possession or right of possession of said property, and that the National Storage Company was at the date of the appointment of the receiver in the possession of the said property and of the premises in which same was stored, and had been so continuously in possession from August 31, 1900, and that said storage com-
408 pany was entitled to the possession of the said premises and property, and in sustaining said portion of said referee's report and in not sustaining said Chicago Title & Trust Company's exception that said referee should have found that said bankrupt had been in possession of the said premises and property since August 31, 1900, and was so possessed at the date of the filing of the petition in bankruptcy herein and delivered possession of said property to said receiver on the date of the filing of his said petition, and the keys of the premises, and said receiver was in possession and had the right of possession of the said property; and in not sustaining said exceptions to that portion of the said report wherein said referee found that the warehouse receipts of the National Storage Company were good and sufficient receipts under the Laws of Illinois, and the endorsements of them by the bankrupt to the First National Bank and to H. W. Rogers & Brother, were valid transfers of the property represented by said warrants, and that an order be entered finding the receiver had not possession or the right of possession of said property set forth in said answers, and that the National Storage

Company was and is entitled to the present possession of the said property, and in not sustaining said exceptions that said referee should have found that said warrants were not good and sufficient warehouse receipts to transfer the property by endorsement of the bankrupt to said bank and said Rogers & Brother, and that such transfer did not constitute good and valid pledges as security for indebtedness owing by said bankrupt to said Bank and said Rogers & Brother respectively as against the rights and interests of said bankrupt estate and the general creditors thereof, and that an order should be entered that said receiver was and is entitled to possession of the said property described in said answers of said Bank and said Rogers & Brother; and in not sustaining said exception to said 409 report that same does not find but should find that at the time of the appointment of a receiver and the adjudication in bankruptcy herein said bankrupt was in possession of and delivered the possession of, said property specified in the answers of the said National Storage Company, First National Bank and H. W. Rogers & Brother to the said receiver, and the said receiver has rightfully held possession thereof ever since and that said report should find said pledges claimed by said Bank and said Rogers & Brother are invalid and void herein.

Nineteenth: In not ordering, adjudging and decreeing that the said trustee should receive and take for said bankrupt estate all that portion of said proceeds of sale in the hands of the said First National Bank which the evidence and record herein show was proceeds of sale of seed designated and described in those warrants held by said Bank and H. W. Rogers and Brother and claimed by them in their said petitions and answers, where said warrants were received by said Bank and Rogers & Brother in exchange for other warrants theretofore held by them from under which other warrants, while the same continued to be held as alleged security by said bank and said Rogers & Brother, the seed described and designated therein had been removed and other and different seed was made to replace the same by the said bankrupt at his place of business before such exchange of warrants was made and within four months of the filing of said petition in bankruptcy, and before adjudication of bankruptcy herein.

Twentieth: In not adjudging and decreeing that said trustee should receive and take from said First National Bank the proceeds of that part of said seed sold by the bank which the evidence and record herein show was stored in the premises of the said bankrupt by him in the place of seed described in said storage warrants named in the said petitions and answers of said Bank and H. W. Rogers & Brother, the seed designated and described in said warrants hav-

ing been removed and disposed of by said bankrupt and that
410 said trustee should so take such proceeds free of any lien or claim of said bank, Rogers & Brother and National Storage Company, and each of them, as security or preferential claim by them or either of them.

Twenty-first: In ordering, adjudging and decreeing that said H. W. Rogers & Brother should be paid out of the proceeds of the said sale the sum of $5,000.00 with interest thereon as adjudged and decreed by the Court.

Twenty-second: In not ordering, adjudging and decreeing that said trustee take said proceeds of sale in the hands of said bank as part of said bankrupt estate and that said petitions, claims and demands of said First National Bank, H. W. Rogers & Brother and the National Storage Company, and each of them, be disallowed and dismissed as having no specific lien upon or security in said proceeds.

Twenty-third: In not finding, adjudging and decreeing that within four months prior to the filing of the petition in bankruptcy herein the said bankrupt gave unlawful preferences to the said First National Bank, while he said bankrupt was insolvent, and the said Bank received and took the same, namely the sum of $17,196.82 and the enforcement of said preferences would have the effect to pay said bank a greater percentage of its indebtedness against the said bankrupt estate and said bankrupt than to other creditors of the same class, and the said bank has not surrendered or offered to surrender said preferences and that its petition claims and demands be dismissed.

Twenty-fourth: In that said judgment and decree is contrary to law.

Twenty-fifth: In that said judgment and decree is contrary to the evidence.

Twenty-sixth: In that said judgment and decree is contrary to the law and the evidence.

Twenty-eighth: In that said judgment and decree is contrary to equity.

411 Wherefore, said Chicago Title & Trust Company, as trustee as aforesaid, prays that for the errors aforesaid said final order, judgment and decree of the said District Court be reversed, and that this cause be remanded to the said District Court with directions for the disposition of the same as is in accordance with law and equity, and that said trustee recover its costs, to the end that justice may be done in the premises, etc.

NEWTON WYETH,
Attorney for Chicago Title & Trust Co., Trustee.

(Endorsed) 5810. United States District Court, District of Illinois. In re Alexander Rodgers, Bankrupt. Petition for Appeal and Assignment of Errors. Filed Nov. 5, 1902 at 10 o'clock A. M. T. C. MacMillan, Clerk. Newton Wyeth, Attorney for Trustee.

412 And afterwards, to wit: on the 5th day of November, A. D. 1902 there was filed in said cause a petition for appeal and assignment of errors, said petition being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Northern Division

In the Matter of Alexander Rodgers Bankrupt. } In Bankruptcy. No. 5810

In the matters of the petition of the Chicago Title & Trust Company, receiver in bankruptcy, the petition of Frank E. Winans, the answers of the First National Bank of Chicago, of H. W. Rogers & Brother, of the National Storage Company, and of James A. Patten to said petition of receiver, the petition of the First National Bank of Chicago, as amended, the petition of H. W. Rogers & Brother and the petition of the National Storage Company, and the answer as amended of the Chicago Title & Trust Company, as trustee in bankruptcy herein, and the answer of James A. Patten, filed to the said petitions, consolidated for hearing:

To the Honorable Christian C. Kohlsaat, District Judge:

Comes Now James A. Patten, by Joseph E. Paden, his attorney, and shows to the Court that he is one of the general creditors of said bankrupt estate and that his claim has been duly filed and allowed therein in the sum of $33,633.53, and prays that the appeal herein prayed by the Chicago Title & Trust Company, trustee in bankruptcy herein, be allowed, and he further shows to the

413 Court that he conceives himself aggrieved by the findings, order, decree and judgment made and entered herein on the 29th day of October, 1902, and he hereby prays to join in the said appeal of the said trustee and also to appeal on his own behalf from the said order, decree, judgment and findings, and from the whole thereof, to the United States Circuit Court of Appeals for the Seventh

Circuit, and he hereby adopts and submits the assignment of errors filed herein this day by the said trustee as to the assignment of errors upon his, said James A. Patten's, own behalf, and he adds thereto the further assignment of errors attached hereto and filed herewith, as his reasons for said appeal, and he prays therefore that his said prayers for appeal be allowed, and that a transcript of the record and of the proceedings and papers, upon which the said findings, order, decree and judgment were founded, may, after due authentication, be sent to the United States Circuit Court of Appeals for the Seventh Circuit.

Dated at Chicago, November 3, A. D. 1902.

JOSEPH E. PADEN,
Attorney for James A. Patten.

414 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Northern Division.

In the Matter of Alexander Rodgers, Bankrupt. } In Bankruptcy. No. 5810

In the Matters of the Petition of the Chicago Title & Trust Company, Receiver in Bankruptcy, the Petition of Frank E. Winans, the Answers of the First National Bank of Chicago, of H. W. Rogers & Brother, of the National Storage Company and of James A. Patten to said petition of the receiver, the Petition of the First National Bank of Chicago, as amended, the petition of H. W. Rogers & Brother and the Petition of the National Storage Company, and the answers of the Chicago Title & Trust Company as Trustee in Bankruptcy herein as amended, and the Answer of James A. Patten, filed to the said Petitions, consolidated for hearing:

ASSIGNMENT OF ERRORS.

Comes Now James A. Patten, By Joseph E. Paden, his attorney, and says that the order, judgment and decree entered in this cause on October 29th, 1902, as well as the findings entered therewith, is erroneous, and against the just rights of him, the said James A. Patten, and he adopts and assigns as errors the errors assigned herein by the said trustee, as errors on his own behalf and prays the benefit of the same as fully as if he had here set out the same in detail and he further assigns the following errors, intended to be urged

and upon which he will rely in his appeal from the said order, judgment and decree in the above entitled cause:

415 That the United States District Court for the Northern Division of Illinois, Northern Division, erred as follows:

First: In the said several matters and things assigned as grounds of error by the said Chicago Title & Trust Company, trustee, filed herein.

Second. In not finding, adjudging and decreeing accordingly, that said National Storage Company had at the time of the filing of the petition in bankruptcy in this cause and that all times thereafter no possession and no right of possession of the said property named and designated in the petitions of said First National Bank, H. W. Rogers & Brother and the same property named in the answer of said National Storage Company to the petition of the said Chicago Title & Trust Company, receiver, as prayed and claimed in said answers and the petitions of said bank, Rogers & Brother and said Storage Company, as against the right and possession of said receiver, afterwards trustee, herein.

Third. In not decreeing and adjudging that said First National Bank, H. W. Rogers & Brother and National Storage Company, were, and none of them was, entitled to any equitable or legal lien upon or preferential claim to the said property received and sold by said bank under the order of the court, or to the proceeds thereof, and that their said claims and petitions be dismissed.

Fourth. In not adjudging and decreeing, instead of the said order, judgment and decree entered by the court, that said trustee was entitled to the said property and to take and hold the said pro-

416 ceeds of sale remaining in the hands of the said First National Bank as a part of the estate of the said bankrupt, free and clear from the claims and demands of said bank, H. W. Rogers & Brother and National Storage Company, and each of them, for security or preferential liens in respect thereto.

Fifth. In not finding, adjudging and decreeing that in the cases where the seed designated and described in the warrants held by said First National Bank and H. W. Rogers & Brother, as set forth in their said answers and petitions, had been removed and taken away by said bankrupt and other and different seed had been by him substituted in place thereof, the said First National Bank, H. W. Rogers & Brother and National Storage Company have, and none of them has, any lien or preferential claim, equitable or legal, to the substituted seed and the proceeds thereof in the hands of said bank.

Sixth. In ordering, adjudging and decreeing that said First Na-

tional Bank retain out of the said proceeds of sale made by it by order of court the sum of $9,854.15, with interest, and that out of said proceeds said bank pay over to said H. W. Rogers & Brother the sum of $5,000.00 with interest, and to said National Storage Company $14.99, and that the said trustee pay the costs in the said porceedings, all as adjudged and decreed by said court.

Seventh. In not finding, adjudging and decreeing that within four months prior to the filing of the petition in bankruptcy and the adjudication in bankruptcy herein the said bankrupt gave unlawful preferences to the said First National Bank, & H. W. Rogers & Brothers, while he, the said bankrupt, was insolvent, and the said bank received and took the same, namely the sum of
417 $17,196.82, and transfer of storage warrants, and said Rogers & Brother received same, namely storage warrants, and the enforcement of the said preferences would have the effect to pay said bank and Rogers & Brother a greater percentage of their indebtedness respectively against said bankrupt and said bankrupt estate than to other creditors of the same class, and that the said bank and Rogers & Brother hvae not surrendered or offered to surrender the said preferences, or any part thereof, and that their petitions, claims and demands be dismissed.

Eighth. In that said judgment and decree is contrary to law.

Ninth. In that said judgment and decree is contrary to the evidence.

Tenth. In that said judgment and decree is contrary to the law and the evidence.

Eleventh. In that said judgment and decree is contrary to equity.

Wherefore, said James A Patten, joining with the said Trustee, as well as on his own behalf, prays that for the errors aforesaid, said final order, judgment and decree of the said District Court be reversed, and that this cause be remanded to the said District Court with directions for the disposition of the same as is in accordance with the law and equity and that the said Trustee recover its costs and that this petitioner as well recover his costs to the end that justice may be done in the premises, etc.

JOSEPH E. PADEN,
Attorney for James A. Patten.

418 Endorsed: 5810. District Court of the United States, Northern District of Illinois. In re Alexander Rodgers, Bankrupt. Petition for Appeal and Assignment of Errors. Filed Nov. 5, 1902, at 10 o'clock A. M. T C. MacMillan, Clerk. Joseph E. Paden, Atty. for Jas. A. Patten.

419 And afterwards, to wit: on the 5th day of November, A. D. 1902, the following order was had and entered of record in said cause, before the Hon? Christian C. Kohlsaat, Judge, to wit:

In re
5810 Alexander Rodgers
Bankrupt

Now the petition of the Chicago Title & Trust Company Trustee in bankruptcy herein and the petition of James A. Patten for appeal from the judgment and decree entered in this cause on October 29, 1902, and the said petitioners having also entered their respective prayers for appeal on said October 29th herein, coming on for hearing, on due notice to all parties in interest, and the Court being advised in the premises,

It is Ordered that the said appeal prayed by said Chicago Title & Trust Company Trustee, to the United States Circuit Court Of Appeals for the Seventh Circuit be, and the same is hereby allowed, and It is further Ordered that the prayer of the said James A. Patten be allowed and that he may join in said appeal of said trustee, and that his appeal on his own behalf also be, and the same is hereby allowed to the said United States Circuit Court of Appeals for the Seventh Circuit upon his filing his appeal bond in the penal sum of $300. within five days from this date.

420 And afterwards, to wit: on the 6th day of November, A. D. 1902, there was filed in said cause a bond on appeal, said bond being in the words and figures following, to wit:

421 Know all Men by these Presents, That we, James A. Patten, as principal, and Joseph E. Paden, as sureties, are held and firmly bound unto The First National Bank of Chicago, H. W. Rogers and James C. Rogers as H. W. Rogers & Brother, The National Storage Company and Frank E. Winans in the full and just sum of Three Hundred Dollars ($300.00) to be paid to the said The First National Bank of Chicago, H. W. Rogers and James C. Rogers as H. W. Rogers & Brother, The National Storage Company and Frank E. Winans, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 6th

day of November in the year of our Lord one thousand nine hundred and two

Whereas, lately at a term of the District Court of the United States for Northern District of Illinois, Northern Division in a suit or petition depending in said Court, between said The First National Bank of Chicago, H. W. Rogers & Brother, The National Storage Company, Frank E. Winans, and the Chicago Title & Trust Company, as trustee, and James A. Patten, in the matter of Alexander Rodgers, bankrupt, in Bankruptcy, Number 5810, there was on the 29th day of October A. D. 1902 a judgment and decree rendered against the said Chicago Title & Trust Company as trustee, said James A. Patten being a party in interest in said judgment and decree as a creditor and the said James A. Patten having obtained appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the said judgment and decree in the aforesaid suit or petition, and a citation directed to the said First National Bank of Chicago, H. W. Rogers & Brother, The National Storage Company and Frank E. Winans citing and admonishing them to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago within 30 days from the date hereof.

Now, the condition of the above obligation is such, That if the said James A. Patten shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—
OSCAR A. KROPF

JAMES A. PATTEN [SEAL]
JOSEPH E. PADEN [SEAL]

Approved by—Nov 6 1902
KOHLSAAT *J.*

122 (Endorsed) 5810 United States District Court Northern Dist. of Illinois Northern Division Filed Nov 6 1902 at 2 P. M. T. C. Mac Millan, Clerk. Bond on Appeal
Within bond & surety approved

WALLACE HECKMAN
ORVILLE PECKHAM

425 IN THE DISTRICT COURT OF THE UNITED STATES.

For the Northern District of Illinois.

Northern Division.

In the Matter of Alexander Rodgers, Bankrupt. } In Bankruptcy. No. 5810.

PRAECIPE FOR TRANSCRIPT OF RECORD.

The Clerk of the said Court will make an authenticated transcript of the record in the above entitled cause:

1. The Petition of the Chicago Title & Trust Company as Receiver, filed May 13, 1901.

1a. Answer of Frank E. Winans filed May 16, 1901.

2. The Petition of Frank E. Winans filed May 17, 1901.

3. The answer of the First National Bank of Chicago, filed May 16, 1901.

4. The answer of H. W. Rogers & Brother filed May 16, 1901.

5. The answer of the National Storage Company filed May 16, 1901.

5a Answer of James A. Patten et al to petition of receiver, filed May 16, 1901.

6. The answer of James A. Patten filed May 20, 1901.

7. The answer (Response) of the Chicago Title & Trust Company, Receiver, to the Petition of Winans, filed May 20, 1901.

7a Appointment trustee July 3, & its bond & qualification July 5 1901

8. Report of Sidney C. Eastman, Referee, filed August 5, 1901.

8a Objections of Chicago Title & Trust Company filed therewith to said report, filed August 5, 1901.

Also, objections of James A. Patten, filed Aug. 5, 1901.

Also, objections of National Storage Company.

426 9. Two Reports of First National Bank of sale filed Sep. 13, 1901.

10. Petition of First National Bank filed September 16, 1901.

Petition of H. W. Rogers & Brother filed September 23, 1901.

Petition of National Storage Company filed October 3, 1901.

11. Answer of Chicago Title & Trust Company, trustee, to Petition of First National Bank filed October 2, 1901.

Also, answers (Responses) of Chicago Title & Trust Company,

trustee, to Petitions of H. W. Rogers & Brother and National Storage Company filed Oct. 2, and Oct. 11, 1901.

12. Answers of James A. Patten and E. W. Bailey to same filed October 1, and Oct. 8, 1901.

12a Answer of Winans filed Oct. 2, 1901.

12b Replication of Rogers & Bro. filed Oct. 11, 1902.

13. Amendments to answers of trustee filed Feb. 25, 1902.

14. Stipulation filed October 29, 1902.

Also, evidence filed October 29, 1902.

15. Notice filed November 5, 1902, of application for appeal.

Petition for appeal and Assignment of Errors filed November 5, 1902.

16. Petition of James A. Patten for appeal and Assignment of Errors filed.

17. November 6, 1902, Bond of James A. Patten.

18. Citations November ——, 1902.

427 Order May 8, 1901, appointing Chicago Title & Trust Company, Receiver. Bond & qualification.

Order May 10, 1901, adjudicating Rodgers a bankrupt.

Order May 10, 1901, referring matter to Sidney C. Eastman.

" July discharging Alex Rodgers in bey.

Order August 5, 1901, of sale.

" August 6, 1901.

Order September 23, 1901, approving report of sale & etc. of trustee and all parties to answer & etc.

Order of October 11, 1901, of consolidation and reference.

Order January 3, 1902, Bank to turn over $5,000 to trustee.

" Feb. 25, 1902, leave to Trustee to amend.

Judgment and decree October 29, 1902.

Order on stipulation October 29, 1902

Order of November 5, 1902, of appeal & etc.

NEWTON WYETH,
Attorney for Chicago Title & Trust Company, Trustee.
JOSEPH E. PADEN,
Attorney for James A. Patten.

Dated Chicago, Illinois, November 6, 1902.

428 (Endorsed) 5810 U. S. District Court Northern District of Illinois. In re Alexander Rodgers, Bankrupt, Praecipe for Record for Appeal. Filed Nov 11 1902 at 10 o'clock A. M. T. C. Mac Millan Clerk. Newton Wyeth Attorney for Trustee.

429 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois.

Northern Division.

I, T. C. Mac Millan, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record and proceedings in the case of Alexander Rodgers, in bankruptcy, No. 5810, as the same appears from the records and files now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Chicago in said District, this 19th day of November, A. D. 1902.

T. C. MACMILLAN
Clerk.

[SEAL.]

423 United States of America, } ss.

The President of the United States, To The First National Bank of Chicago; H. W. and James C. Rogers as H. W. Rogers and Brother, The National Storage Company and Frank E. Winans, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Northern Division, wherein James A. Patten is appellant and you are appellees, to show cause, if any there be, why the judgment and decree rendered against the Chicago Title & Trust Company, trustee, said appellant in interest, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Christian C. Kohlsaat Judge of the District Court of the United States, for the Northern District of Illinois this 6th day of November, in the year of our Lord one thousand nine hundred and two

KOHLSAAT
United States District Judge.

Service of the within citation accepted this 7th day of November, 1902.

HECKMAN, ELSDEN & SHAW,
Attorneys for National Storage Company
KERR & KERR,
Attorney for H. W. Rogers & Bro.
ORVILLE PECKHAM,
Attorney for The First National Bank of Chicago
Attorney for
GREGORY, POPPENHUSEN & MCNAB,
Attys for F E Winans

424 United States of America, } ss.

The President of the United States, To The First National Bank of Chicago, H. W. Rogers and James C. Rogers as H. W. Rogers and Brother, The National Storage Company and Frank E. Winans, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Northern Division, wherein the Chicago Title and Trust Company is appellant, James A. Patten joining in said appeal, and you are appellees, to show cause, if any there be, why the judgment and decree rendered against the said appellant, Chicago Title and Trust Company as in the said appeal metnioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Christian C. Kohlsaat Judge of the District Court of the United States, for the Northern District of Illinois, this 6th day of November, in the year of our Lord one thousand nine hundred and two

KOHLSAAT
United States District Court.

Service of the within citation accepted this 7th day of November, 1902.

HECKMAN ELSDON & SHAW
Attorneys for National Storage Company
KERR & KERR
Attorney for H W Rogers & Bro.
ORVILLE PECKHAM
Attorney for The First National Bank of Chicago
GREGORY P & MCNAB
Attorney for F. E. Winans

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 366, inclusive, contain a true copy of the printed record filed in this court on December 8, 1902, which was prepared for the printer, indexed, supervised and distributed by me in accordance with the rules of this court, and upon which the causes were determined by the United States Circuit Court of Appeals for the Seventh Circuit in cause No. 948, Chicago Title and Trust Company Trustee and James A. Patten vs. First National Bank of Chicago, H. W. Rogers and James C. Rogers, as H. W. Rogers & Brother, The National Storage Company and Frank E. Winans; and cause No. 949, James A. Patten vs. First National Bank of Chicago, H. W. Rogers and James C. Rogers, as H. W. Rogers & Brother, The National Storage Company and Frank E. Winans.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this thirtieth day of April, A. D. 1903.

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

[SEAL.]

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held at the United States Court-Rooms in the City of Chicago in said Seventh Circuit, on the seventh day of October, 1902, of the October term in the year of our Lord one thousand nine hundred and two and of our Independence the one hundred and twenty-seventh year.

And afterwards, to-wit: On the first day of December, 1902, in the October term last aforesaid, came The First National Bank of Chicago of Chicago, by its counsel Mr. Orville Peckham and filed in the office of the clerk of this court his appearance, which appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 948 October Term, 1902.

Chicago Title and Trust Company, Trustees, etc. and James A. Patten,
vs.
First National Bank of Chicago, *et al.*

The Clerk will enter my appearance as Counsel for The First National Bank of Chicago.

ORVILLE PECKHAM.

Endorsed: Filed Dec. 1, 1902. Edward M. Holloway, Clerk

And afterwards, to-wit: On the second day of December, 1902, in the October term last aforesaid, came the Appellees, Henry W. Rogers and James C. Rogers, by their counsel Mr. Samuel Kerr, and filed in the office of the clerk of this court his appearance, which appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 948 October Term 1902.

Chicago Title and Trust Company, Trustees, etc. and James A. Patten,
vs.
First National Bank of Chicago, *et al.*

The Clerk will enter my appearance as Counsel for the Appellees Henry W. Rogers and James C. Rogers.

SAMUEL KERR.

Endorsed: Filed Dec. 2, 1902. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the second day of December, 1902, in the October term last aforesaid, came the Chicago Title and Trust Company, by its counsel Mr. Newton Wyeth, and filed in the office of the clerk of this court his appearance, which appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 948 October Term 1902.

Chicago Title and Trust Company, Trustees, etc. and James A. Patten,
vs.
First National Bank of Chicago, *et al.*

The Clerk will enter my appearance as Counsel for the Chicago Title and Trust Company, Appellant,

NEWTON WYETH.

Endorsed: Filed Dec. 2, 1902. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the second day of December, 1902, in the October term last aforesaid, came the Appellants by their counsel Mr. Newton Wyeth and Mr. Joseph E. Paden, and filed in the office of the clerk of this court their appearance which appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 948 October Term 1902.

Chicago Title and Trust Company, Trustees, etc. and James A. Patten,
vs.
First National Bank of Chicago, *et al.*

The Clerk will enter my appearance as Counsel for the Appellants.

NEWTON WYETH
JOSEPH E. PADEN.

Endorsed: Filed Dec. 2, 1902. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the third day of December, 1902 in the October term last aforesaid, came the appellee, the National Storage Company, by its counsel Mr. Wallace Heckman and filed in the office of the clerk of this court his appearance which appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 948 October Term 1902.

Chicago Title and Trust Company, Trustees, etc. and James A. Patten,
vs.
First National Bank of Chicago, *et al.*

The Clerk will enter my appearance as Counsel for the National Storage Company, appellee.

WALLACE HECKMAN.

Endorsed: Filed Dec. 3, 1902. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the third day of December, 1902, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Wednesday, December 3, 1902.

Before:

Hon. James G. Jenkins, Presiding Judge.

Chicago Title and Trust Company, Trustee, etc. 948. *vs.* First National Bank of Chicago, *et al.*	Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

Upon application of counsel for appellant, it is ordered that the printed records used on the trial of this cause in the District Court of the United States for the Northern District of Illinois may be used by the clerk of this court in making up the printed records, if the same conform or are made to conform with the rules of this court.

And afterwards, to-wit: On the sixth day of January, 1903, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Tuesday, January 6, 1903.

Court met pursuant to adjournment.

Present:

Hon. James G. Jenkins, Circuit Judge presiding.
Hon. Peter S. Grosscup, Circuit Judge.
Hon. Francis E. Baker, Circuit Judge.

In the Matter of Alexander Rodgers, Bankrupt.

Chicago Title and Trust Company, Trustee, etc. 948. *vs.* First National Bank of Chicago, *et al.*	Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

It is ordered by the court that this cause be, and the same is hereby set down for hearing January 22, 1903.

And afterwards, to-wit: On the twenty-second day of January, 1903, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Thursday, January 22, 1903.

Court met pursuant to adjournment.

Present:

Hon. James G. Jenkins, Circuit Judge presiding.
Hon. Peter S. Grosscup, Circuit Judge.
Hon. Francis E. Baker, Circuit Judge.

In the Matter of Alexander Rodgers, Bankrupt.

Chicago Title & Trust Company, Trustee, etc.
948. *vs.*
First National Bank of Chicago, *et al.*

Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel, and on oral argument by Mr. Newton Wyeth and Mr. Joseph E. Paden, counsel for appellant, and by Mr. Orville Peckham, Mr. Samuel Kerr and Mr. Wallace Heckman, counsel for appellees, and the court having heard the same, takes this matter under advisement.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held at the United States Court-Rooms in the City of Chicago in said Seventh Circuit on the seventh day of October, 1902, of the October term in the year of our Lord one thousand nine hundred and two and of our Independence the one hundred and twenty-seventh.

And afterwards, to-wit: On the first day of December, 1902, of the October term last aforesaid, came The First National Bank of Chicago, by its counsel Mr. Orville Peckham, and filed in the office of the clerk of this court his appearance, which appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 949 October Term, 1902.

James A. Patten,

vs.

First National Bank of Chicago, H. W. Rogers and James C. Rogers, etc., *et al.*

The Clerk will enter my appearance as Counsel for The First National Bank of Chicago.

ORVILLE PECKHAM.

Endorsed: Filed Dec. 1, 1902. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the second day of December, 1902, in the October term last aforesaid, came the appellant James A. Patten, by his counsel Mr. Newton Wyeth and Mr. Joseph E. Paden, and filed in the office of the clerk of this court their appearance, which appearance is in the words and figures following to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 949. October Term, 1902.

James A. Patten,

vs.

First National Bank of Chicago, H. W. Rogers and James C. Rogers, etc., *et al.*

The Clerk will enter my appearance as Counsel for James A. Patten, Appellant.

NEWTON WYETH
JOSEPH E. PADEN.

Endorsed: Filed Dec. 2, 1902. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the second day of December, 1902, in the October term last aforesaid, came the appellees, Henry W. Rogers and James C. Rogers, by their counsel Mr. Samuel Kerr, and filed in the office of the clerk of this court his appearance, which appearance is in the words and figures following to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 949. October Term, 1902.

James A. Patten,

vs.

First National Bank of Chicago, H. W. Rogers and James C. Rogers, etc., *et al.*

The Clerk will enter my appearance as Counsel for the appellee Henry W. Rogers and James C. Rogers.

SAMUEL KERR.

Endorsed: Filed Dec. 2, 1902. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the third day of December, 1902, in the October term last aforesaid, came the Appellee, The National Storage Company, by its counsel Mr. Wallace Heckman, and filed in the office of the clerk of this court his appearance, which appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 949. October Term, 1902.

James A. Patten,

vs.

First National Bank of Chicago, H. W. Rogers and James C. Rogers, etc. *et al.*

The Clerk will enter my appearance as Counsel for The National Storage Company, Appellee.

WALLACE HECKMAN.

Endorsed: Filed Dec. 3, 1902. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the third day of December, 1902, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Wednesday, December 3, 1902.

Court met pursuant to adjournment.

Before:

Hon. James G. Jenkins, Presiding Judge.

949.	James A. Patten, *vs.* First National Bank of Chicago, *et al.*	Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

Upon application of counsel for appellant, it is ordered that the printed records used on the trial of this cause in the District Court of the United States for the Northern District of Illinois may be used by the clerk of this court in making up the printed records, if the same conform or are made to conform with the rules of this court.

And afterwards, to-wit: On the sixth day of January, 1903, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Tuesday, January 6, 1903.

Court met pursuant to adjournment.

Present:

Hon. James G. Jenkins, Circuit Judge presiding.
Hon. Peter S. Grosscup, Circuit Judge.
Hon. Francis E. Baker, Circuit Judge.

949.	In the Matter of Alexander Rodgers, Bankrupt. James A. Patten, *vs.* First National Bank of Chicago, *et al.*	Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

It is ordered by the court that this cause be, and the same is hereby, set down for hearing January 22, 1903.

And afterwards, to-wit: On the twenty-second day of January, 1903, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Thursday, January 22, 1903.

Court met pursuant to adjournment.

Present:

Hon. James G. Jenkins, Circuit Judge presiding.
Hon. Peter S. Grosscup, Circuit Judge.
Hon. Francis E. Baker, Circuit Judge.

In the Matter of Alexander Rodgers, Bankrupt. James A. Patten, 949. *vs.* First National Bank of Chicago, *et al.*	Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral argument by Mr. Newton Weyth and Mr. Joseph Paden, counsel for appellant, and by Mr. Orville Peckham Mr. Samuel Kerr and Mr. Wallace Heckman, counsel for appellees, and the court having heard the same, takes this matter under advisement.

And afterwards to-wit: On the twenty second day of April, 1903, in the October term last aforesaid, there was filed in the office of the clerk of this court an opinion, which opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Nos. 948-949. October Term 1902. January Session 1903.

In re Alexander Rodgers, Bankrupt. } In Bankruptcy. Appeals from the District Court of the United States for the Northern District of Illinois.

Before Jenkins, Grosscup and Baker, Circuit Judges.

Alexander Rodgers was adjudged a bankrupt on May 8th, 1901, and on that day the Chicago Title & Trust Company was appointed receiver, and subsequently trustee of the property and estate of the bankrupt, and took possession of the estate, including the property hereinafter mentioned. The bankrupt was a dealer in seeds, having his place of business upon the premises Nos. 220 to 230 Johnson street in the city of Chicago. These premises, consisting of the south half of the basement, the north half of the south half of the second, third, fourth, fifth and sixth floors, with the right of way to the south elevator from the railroad platform by way of the east door on platform, and by way of entrance on alley, and the right of way to go upon the elevator, and the right to ship in and out by wagons, by the front door, by chute, and by the rear entrance, as described, were leased by him from one Hascall from January 10, 1899, to April 30, 1902, at a monthly rental of two hundred dollars. On November 28, 1899, he also leased until April 30, 1902, the south one-fourth of the fifth and sixth floors, at an additional rental of fifty dollars per month. So that, after that date, he had the whole of the south half of the fifth and sixth floors, the north half of the south half of the second, third and fourth floors, and the whole of the south half of the basement, the first floor being vacant and used as a passage way. A wooden partition separated the south half from the north half of the floors of the building, the latter being occupied by another tenant. The entrance was from the west front of the building on Johnson street to the main floor, and thence stairways at the south

end of the building ran from each floor to the floor above and to the basement. The front of the south half of the second floor was partitioned into an office and was occupied by the bankrupt. There were also machinery and appliances and a freight elevator for the handling of seed, and on certain floors were bins with cleaning machinery for cleaning and grading seed. The seed was usually received from railroad cars into the basement, thence elevated to the top floor, if to be dumped or cleaned, and was usually received and shipped in bags, most of the business being in carload lots of about two hundred and fifty bags, and when stored on any floor was usually in carload lots. The usual pile or lot was made up in two tiers of bags, lying horizontally, the ends of the bags of one tier abutting the ends of the bags of another, with five or six bags piled up in front against the two tiers. These piles were about sixteen feet long and six to seven feet high. The building was known as mill construction, that is, the timbers were exposed posts supported by joists and girders. The various floors were known as divisions from the sixth down, A, B, C, D, E and F, the latter being the basement. Depending from the ceiling girders or joists were wooden signs on which were painted "Div." with the letters "A" "B" &c, indicating the floor, and "Sec." with a number thereafter, as 1, 2, 3 &c, to indicate a section, so called, of the floor. The floors were large open floors, 50 by 90, or 60 by 100 feet, and had no bins for the separate storage of seed, and had no partitions dividing the floor space. The boundary lines of "sections" were imaginary lines, the signs being put up by Rodgers upon his leasing the premises, and there was no division of sections on the second floor, where a large part of the seed now in controversy was located.

The National Storage Company is a corporation, incorporated under the laws of the state of Illinois on December 29, 1886. It was authorized to carry on a general warehouse business, to receive, for safe keeping or storage, general merchandise, grain, &c; to take charge of and perform the duty of paying freight charges, duties &c on bonding, receiving, landing, hauling and delivering such property deposited, or intended to be deposited with such corporation; to issue receipts or certificates for goods and personal property to the owner or owners thereof, when such goods and personal property "have been received, are on the premises, or under the control of the said corporation at the time of issuing such receipts or certificates."

On August 25, 1900, the National Storage Company and the bankrupt entered into the following written agreement:

"PROPOSAL FOR WAREHOUSING.
OFFICE OF NATIONAL STORAGE COMPANY,
Chicago, Ills., August 25th, 1900.

Mr. Alexander Rodgers,
#220 Johnson Street, Chicago, Illinois.

Dear Sir: 1. The National Storage Company hereby proposes to issue its storage warrants to the order of yourself or to such order as the acceptor hereof may hereafter direct, upon personal property consisting in part of Field Seeds to be stored in the premises known as #220-#230, Johnson Street, Chicago, Illinois.

2. All of the above named premises, or such portions thereof as may from time to time be required, shall as and when required be leased to the National Storage Company. Said premises are to be designated as National Storage Company's Warehouse Premises Number 281.

3. Rates, Terms and Conditions which shall govern the storage of property or issue warrants under this proposal are as follows.

On property valued at $10,000 or less, the charge for the first calendar month or fraction will be $7.50, for each succeeding month or fraction $7.50, and for each additional $1,000 or fraction, the rate will be $.75 per month.

All traveling expenses and other incidental expenditures incurred while conducting the business under this proposal, and all costs of placing property in store, such as measuring, weighing, tallying, surveying platting or drafting, etc. will be added to above charges. A certified memorandum must be rendered, showing market values of the property placed in store on which storage charges are to be based.

4. Substantial fences, gates, partitions, doors or other forms of enclosure, for enclosing or protecting property, for which warrants of this Company have been or may hereafter be issued, shall be constructed and kept in repair by acceptor hereof, and if not so constructed or repaired upon request, this Company is hereby authorized to forthwith construct or repair same, and place any cost thereof as a charge against the property enclosed or protected thereby.

5. Any and every lease executed in pursuance of this proposal shall, upon written notice delivered to the National Storage Company by the acceptor hereof, be duly cancelled and the premises surrendered only when and after all warrants issued under, upon or by reason of any and every application executed by such acceptor, shall have been delivered to this Company under terms and conditions of this proposal and said warrants.

6. It is understood unless otherwise provided in writing, that this proposition under its terms contemplates, that the quantity of grain which may be received for storage, shall be determined by a measured bushel standard. Grain will be received by weight and so accounted for charges for weighing by this Company's representatives to be paid by acceptor hereof.

7. Storage charges are due and payable as elected by this Company, at time of delivery, monthly, or at close of each calendar quarter. It is provided, that if for any cause delivery of property be made on which storage charges have not been paid, the remaining property will be held liable for same and all other charges which may have accrued. The costs for delivery of property when attended by superintendence of this Company are not rated as storage charges. Such costs and other contingent expenses will form basis for additional charge. Surrender of warrants and payment of charges to date of such surrender will not cease or terminate storage charges until property has been accepted, and Release Permits have been signed by party authorized to receive the property surrendered, and permits have been received at office of this Company.

8. Should increased cost, or additional services, or risk, in reference to said property or warrants, be incurred by reason of the sale or pledge of the warrants, and the property, covered thereby, then the rate on each warrant, shall be such as shall be fixed by this Company, not exceeding the rates named therein.

9. The services of a capable person satisfactory to this Company must be provided to represent its interests, such person shall also be acceptable to any surety company from whom indemnity bond may be asked in adequate amount, and commensurate with value of property received by this company and covered by its warrants. To defray cost of bond and services of such custodian a charge against the property will be made, unless otherwise adjusted.

10. This Company reserves the right to recall and issue new warrant, for remainder of any warrant having three or more endorsements thereon of property delivered therefrom, also to recall and issue new warrant for remainder of any warrant, at expiration of one year from its date, having one or more endorsements thereon of property delivered therefrom, provided that in either case the guarantee afforded by endorsers is not affected thereby.

11. It is understood that while the identity of each respective lot of property received by this Company, shall always be maintained, any surplus remaining after the delivery of any certain

lot or lots may be retained by the Storage Company, until all charges are paid, and all warrants issued in pursuance of this proposal shall have been surrendered and satisfied.

12. It is to be understood also, that should this Company at any time hereafter, for any reason deem the premises furnished for its occupancy insecure for its purposes, or, for any cause be interfered with in the possession or removal of property covered by its warrants, or be dispossessed of the storage premises, which are now or may hereafter be leased by it, that it is hereby authorized, without notice to holders of warrants upon all or any part of the property stored in such premises, to provide other suitable storage premises, move the property thereto, and cause policies of insurance to issue thereon to its own order in trust for amount of value shown by said valuation memorandum, or more at its discretion. All costs or expenses accruing by means of such removal, interference or dispossession, including insurance premiums, and increased rental paid by this Company, for space occupied by such property, shall be chargeable against the property in addition to the storage rate above specified. And if the same or any other charges are and remain unpaid for ninety days or more, this Company is hereby authorized to sell the property in the manner, legally provided for enforcing warehousemens' lien, and shall apply the proceeds of such sale:

First: To the payment of all costs and expenses of such sale.

Second: To the payment of all sums due this Company under, upon or by reason of this proposal, and the overplus if any, shall be held for and upon demand paid to the party or parties legally entitled thereto. When this Company shall have given the legal notice and sold the property as provided thereunder; then all warrants affected thereby shall be null and void as against the National Storage Company.

13. The Property delivered for purpose of storage must remain undisturbed until warrants covering same are surrendered, receive at office of this Company in Chicago and "Release Permits" duly received and countersigned by Custodian in charge and receipt signed for property by party authorized to receipt for same.

14. The acceptance hereof shall empower The National Storage Company to place its signs and marks upon the property and enclosure to such an extent as shall fully protect possession in compliance with laws regarding same, which signs and marks must at all times remain undisturbed and unobscured.

15. Upon conclusion and settlement of all business under this

proposal, all copies of original and duplicate papers, shall, upon request of this Company be cancelled and returned to it.

Very respectfully,

NATIONAL STORAGE CO.,
By WALTER TOD,
Treasurer.

"Accepted.
ALEX. RODGERS."

And thereupon the bankrupt executed a lease to the National Storage Company as follows:

"This Agreement, Made this thirty-first day of August, in the year of our Lord one thousand nine hundred ..... between Alexander Rodgers, of Chicago, County of Cook, and State of Illinois, party of the first part, and National Storage Company, a corporation organized and existing under the laws of the State of Illinois, party of the second part,

Witnesseth: That the said party of the first part for and in consideration of the covenants and agreements hereinafter mantioned and contained, to be kept and performed by the said party of the second part, its successors and assigns, hereby does demise, lease, and let unto the said party of the second part the following described premises, situated in the City of Chicago, County of Cook and State of Illinois, to wit:

All of the basement and second floor, the North Half (N. 1/2) of the third (3) and fourth (4th) floors and all of the fifth (5th) and sixth (6th) floors of the six (6) story and basement Brick Building situated at and known as #220 #222 #224 #226 #228 and #230 Johnson Street, for and during the term of three years from and after the date of this Agreement (and so long thereafter as property remains thereon for which warants of said Storage Company have been issued and are in force and effect) for a yearly rental of One Dollar, and other good and valuable considerations, the receipt of which in advance, is hereby acknowledged by the party of the first part.

This lease is made upon the express conditions following, to wit:

First. That the said leased premises shall be used and occupied exclusively for the storage of Personal Property, and for the transaction of such other business as may be connected therewith, or incident thereto, in pursuit of any rights claimed in performance of duties of said Storage Company as Warehousemen.

Second. That the said second party will not receive upon premises above described any property for purposes of storage,

after due notice in writing has been received by said Storage Company, from said first party, that termination of this lease is desired.

Third. Said party of the second part its agent or agents shall, for the purpose of inspection or removal of any property which may be located in premises herein leased, be permitted easy and convenient passage at any and all times, through any part of the abutting premises that is or may hereafter be occupied or controlled by said party of the first part.

Fourth. Said party of the second part shall, for the convenient moving of property to or from the above described premises, have free from cost of operation the use of elevators, tracks, cars, scales, scale house and any other fixtures or appliances that party of the first part now has or may acquire during term of this lease, and shall be privileged to place any marks, signs or other evidences of possession which it may deem necessary or desirable.

Fifth. It is understood and agreed to by and between the parties hereto that the "moving of property" shall include the complete delivery of same on cars, wagons, or other means of transfer should party of the second part so elect.

In Witness Whereof, the parties to these presents have hereunto set their hands and seals the day and the year first above written.

[L. S.] ALEXANDER RODGERS [SEAL]
[L. S.] NATIONAL STORAGE COMPANY [SEAL]
BY WALTER TOD."

Upon the execution of the lease, the National Storage Company tacked on the walls of the several floors, notices in white letters upon dark blue enamelled tin 3 x 7 inches, there being eight of the signs, which were distributed to the several floors of the building. These signs read: "This property controlled by the National Storage Company as a public warehouse. Warehouse premises No. 981." These signs were placed seven or eight feet from the floor on the side of the building and on the partitions between the premises in question and the north half of the building; but no signs were placed on the exterior of the building.

When the bankrupt desired a storage warrant he made application upon a blank form to the National Storage Company as follows:

"Application for Storage Warrant.

Chicago, Ill.

To the National Storage Company,

Chicago.

For the purpose of obtaining your Storage Warrants the subscriber has placed in your Warehouse premises No. 281, located at Nos. 220-230 Johnson St. Chicago Ill. the following property, to wit:"

"It is hereby certified that this property belongs to the undersigned, is in good mercantile condition and free from lien or encumbrance. Said Storage Warrants to be issued to order of Alex Rodgers, in accordance with proposal for Warehousing Contract dated Aug. 25, 1900, of which this Application and the Valuation Memorandum bearing same Warrant Numbers and of even date herewith is hereby made a part", accompanying the same with a valuation memorandum as follows:

"VALUATION MEMORANDUM.

Chicago.

NATIONAL STORAGE COMPANY,

Room 217, First Nat'l Bank Bldg., Chicago.

To Alex Rodgers,

#220 #230 Johnson St., Chicago.

Numbers Lot.	Description of Property.	Date.	Market Values.		Warrant Number.
			Value of each item.	Values covered by each warrant.	

The property specified on the above memorandum which for purposes of warehousing has this day been placed in the possession of the National Storage Company, by the subscriber, is the same as that entered on Application for Storage warrant of corresponding warrant number, and even date herewith, and the undersigned hereby guarantees that the responsibility of the Storage Company, in event of loss of any property covered by warrants enumerated, shall not exceed the values given above, unless, before such loss occurs, notice of change in value shall have been given to and acknowledged by said Storage Company."

Thereupon, an employe of the company would inspect the property specified in the application and valuation memorandum, and place upon the pile a pasteboard tag of the form following:

"No disturbance permitted while this card is posted.

"Warehouse card, National Storage Company, dated .... Warrant No. ..... Lot No. ..... Section No. ..... pile No. ....." The Storage Company would then issue to the bankrupt a warehouse warrant or receipt in the form following:

"Warrant No. ..... Lot No. ..... National Storage Company, Office 217 First National Bank Building, Chicago, hereby acknowledges to have received ..... to weigh ..... pounds, contained in Div. ..... Sec. ..... floor at its warehouse premises No. 281, located at 220 to 230 Johnson Street, Chicago, Illinois, and will surrender the same to the order hereon of Alexander Rodgers upon payment of charges and delivery of this warrant, at its office, Chicago, duly endorsed.

It is agreed that this company is not responsible for loss or damage to property occasioned by fire, water, leakage, vermin, ratage, shrinkage, accidental or providential causes, riot or insurrection, frost or change of weather, or from being perishable while in storage, and that this company shall, in the custody of the above property, be the agent of the holder of this warrant.

Record Book ..... page ..... Storage and charges as per contract on file with this company.

Chicago ....."

These warrants the bankrupt would place at banks and wtih others as collateral to loans made to him. When it was desired to remove seed for which warehouse receipts had been obtained, application was made on a formal printed blank, the warehouse receipt returned and cancelled, and a release issued by the Storage Company to the bankrupt.

The Storage Company had no warehouse of its own, only such as was leased, as was the one in question here. It had no keys to this building. The bankrupt alone had the keys, and access thereto was obtainable only through him. The signs placed upon the walls of the building were obscured and not readily observable by reason of the fact that the piles of seed were higher than the signs. After the lease, he continued as before to carry on his ordinary business upon the premises, maintaining an office with sundry clerks and workmen upon the premises. He bought and shipped seed, cleaned the same, and occasionally cleaned seed on which receipts were

issued, taking it out of the bags, cleaning it and restoring and adding a sufficient amount of other seed to equalize the loss in the cleaning. Also, in some instances, the bankrupt shipped out the property before the receipts were cancelled; but the Storage Company did not know of it. The bankrupt, also, from time to time, as the exigencies of his business prompted, brought seed to the warehouse and substituted it for seed on which receipts had been issued, removing the seed on which receipts had been issued and replacing the tags on the bags substituted. This was done in many instances, and sometimes several times with the property covered by one receipt. Whether the Storage Company knew of this custom of business is left somewhat doubtful by the evidence. The Storage Company, however, had notice of the custom of the bankrupt to clean the seed so placed in storage. The inspector of the Storage Company called at the premises from one to five times a week. Once or twice a week he would check over the goods stored and see that the tags were on the bags and that the stock was all right. The bankrupt hypothecated some of these receipts with the First National Bank of Chicago to secure loans to the amount of twelve thousand dollars, and some of them with H. W. Rogers & Brother to secure a loan of five thousand dollars, and he sold some of the receipts to other parties, receiving the full value of the seed.

Upon the adjudication of bankruptcy, the receiver, at the request of the general creditors of the bankrupt, applied for an order for the immediate sale of the seed in the warehouse: whereupon the First National Bank of Chicago appeared and pleaded that the bankruptcy court was without jurisdiction to decree a sale of a certain part of the property, alleging, in support of its plea, that it held warehouse receipts issued by the Storage Company upon certain specified parts of the property, which were duly endorsed by the bankrupt and delivered and pledged to the bank for moneys in good faith loaned and advanced to the bankrupt, and claiming that the property was in the full possession and control of the National Storage Company and was not in the rightful possession of the receiver. A similar plea was filed by H. W. Rogers & Brother, who held warehouse receipts on certain other part of the property to secure a loan of five thousand dollars. The National Storage Company also appeared, denying the jurisdiction of the court to order any sale of the property, setting forth the property which at the time of the bankruptcy was stored in the premises, upon which it had issued warehouse receipts, and claiming that it was in the actual possession of the property, and that its receipts entitled the

holders thereof, upon presentation to it, to possesion of the property.

The matter was referred to a referee, who reported, August 5, 1901, that the bankrupt, by reason of the fact stated, was not, at the date of filing the petition or at the date of adjudication, in possession of the property mentioned in the answers, and that the receiver had not possession or right of possession of the property; that the receipts of the National Storage Company were valid under the law of the State of Illinois and were transferrable by endorsement; and that the endorsement of the receipts, held by the several parties answering, constituted valid transfers to them of the property represented by such receipts; and recommending that the petition be dismissed, as respects all property covered by the warehouse receipts. On the same day the court entered an interlocutory decree, which held that the receiver receive and take possession from the bankrupt, peaceably, the property in question, namely: the several lots of seed, set forth in the answers of the First National Bank, H. W. Rogers & Brother, and the National Storage Company, in the warehouse; and that the court had jurisdiction and possession of that property in this cause; that the court sustained the objections and exceptions to the report as to the jurisdiction and possession of the court; and it being deemed most advantageous to sell the seed in question at that time, and the bank stipulating that it would sell and hold the funds derived from the sale of the seed subject to the further order of the court, it was ordered that the First National Bank sell the seed at once and report its acts and doings in the premises to the court. The sale was had, and on September 23, 1901, the court confirmed the sale, and the bank and Rogers & Brother filed their petitions, claiming preference and liens on the proceeds of the sale reported by the bank; and the court ordered the trustee of the bankrupt and any parties in interest to answer such petition. The trustee and James A. Patten, creditor, thereupon answered such petitions; upon which proof was taken, and on October 29, 1902, the court entered a final decree confirming the report of the referee, except so far as the same found that the bankruptcy court was without jurisdiction; decreed that the receiver had not the right of possession to the property mentioned, but that the National Storage Company had and was entitled to the same; and, reciting the sale of the property by the First National Bank under the interlocutory order or decree, the proceeds of which were in possession of the First National Bank, distributed the proceeds to that bank and to H. W. Rogers & Brother, according to their respective claims. From which decree

the trustee and James A. Patten, a creditor to the amount of $34,000, appeal to this court.

Jenkins, Circuit Judge, delivered the opinion of the court.

The court below properly ruled that it had jurisdiction of the subject matter. Its officers acquired possession of the property in dispute from the bankrupt. It is, indeed, claimed by the Storage Company that the writings and the facts embodied in the statement of the case show that it, and not the bankrupt, had possesion prior to the bankruptcy; but the receiver had in fact acquired peaceable possession of the property, and subsequent proceedings in the bankruptcy court upon petition of the present objectors to the jurisdiction, by which the property was sold by the bank under stipulation that it should hold the fund subject to the order of the court, placed the property and its proceeds in custodia legis, and the court had the right to determine the ownership of the fund in its possession. *Haven & Geddes Company* v. *Pierce, Trustee*, 120 Fed., 244; *In re Antigo Screen Door Company*, herewith decided.

The policy of the law of the State of Illinois denounces all secret liens upon property; they are held to be constructively fraudulent as to creditors, and the property, so far as their rights are concerned, is considered as belonging to the one having the ostensible possession. *Ketcham* v. *Watson*, 24 Ill., 501; *McCormick* v. *Hadden*, 37 Ill., 370; *Murch* v. *Wright*, 46 Ill., 487; *Chickering* v. *Bastress*, 130 Ill., 206; *Peoria Manufacturing Company* v. *Lyons*, 153 Ill., 435. And so property held upon conditional sale is subject to attack and may be held against the vendor by creditors of the possessor; and this upon the ground that to suffer, without notice to the world, the real ownership to be in one person and the ostensible ownership in another, gives a false credit to the latter and in this way works an injury to third persons. It is said, in *The Union Trust Company* v. *Trumbull*, 137 Ill., 146, 180: "There is no mode under our law, except by chattel mortgage duly acknowledged and recorded, by which the owners of personal property, retaining its possession, can give another a lien upon it that can be enforced as against creditors and subsequent purchasers."

Although the rule is otherwise in other states with respect to conditional sales (*Harkness* v. *Russell*, 118 U. S., 663), we are in duty bound to defer to the law of the state in respect of property within that state. *Hervey* v. *Rhode Island Locomotive Works*, 93 U. S., 664, 672; *Dooley* v. *Pease*, 180 U. S., 126. The transaction is not changed by the form of the agreement under which it is cloaked. We are to look to the real purpose of the contract, and not to the form or the name given it by the parties. *Murch* v.

Wright, supra; Hervey v. *Rhode Island Locomotive Works, supra.*

We are thus brought to the consideration of the real character and purpose of the transaction between the bankrupt and the Storage Company. We are to ascertain the real intention of the contracting parties from the whole agreement, read in the light of the surrounding circumstances. The bankrupt was largely engaged in purchasing seed upon credit, storing the property purchased in his warehouse. He occupied the premises as a place of business, maintaining an office there, with clerks to assist in the management of the business, and with porters to handle the seed. The premises were subject to a rental of $250.00 a month. He arranged with the Storage Company, which had no warehouse of its own, that it would issue warehouse warrants or receipts to the bankrupt for property upon the bankrupt's premises, for a certain small charge per month upon the value of the property covered by the receipts. He executed a lease of the premises to the Storage Company, to continue so long as the bankrupt should desire and so long as property remained thereon for which warrants or receipts had been issued; and this without any payment of rent by the Storage Company, the rental in fact being paid by the bankrupt. The Storage Company neither required, nor was it given, any key to the premises. The bankrupt remained in possession of the premises as before the agreement, continuing to transact his business there as he had formerly done. There were certain signs placed upon the different floors of the building, indicating that the Storage Company controlled the premises. These were small and obscure signs, not likely to attract attention, and most of them hidden behind the piles of bags of seed. No sign was displayed upon the exterior of the building indicating any proprietorship of the Storage Company, or giving notice to the world that any other than the bankrupt had possession and control. There was no open, notorious manifestation of a change of possession, none was intended, and there was none in fact. Upon each pile of bags of seed for which the warehouse receipts or warrants were issued, there was placed a small tag, which might be discovered upon careful search. The bankrupt substantially treated this property as his own; at times going through the forms prescribed by the Storage Company; and whenever he found it necessary, ignoring them. We do not find that the Storage Company had knowledge of this action of the bankrupt; but it certainly knew that it was possible under the circumstances for the bankrupt to do with the property as he would, since it was left within his control.

It is difficult for us to look upon this transaction as a warehousing of property. The Storage Company assumed no liability to the bankrupt, and assumed only such responsibility as the law imposed upon it with respect to those advancing money upon the faith of its warehouse warrants or receipts. The name of the company is in itself, under the circumstances, a false pretense. It did not store property. It had no premises upon which to store property. The bankrupt stored the property. The bankrupt paid the rental of the premises. It is true that an agent of the Storage Company occasionally visited the premises and inspected the property in a sort of a way, but exercised no supervision or control that would prevent the bankrupt from doing with it as his will might dictate, or his financial necessities might require. We cannot but regard this arrangement as a subterfuge, a mere device to enable the bankrupt to hypothecate the warehouse warrants or receipts, and so to raise money upon secret liens upon property in his possession and under his control. The written agreement indicates this. It is somewhat startling to learn that a warehouse company should store goods of this character for another upon the premises of that other, taking compensation as for storage, not related to the cost of storage, or to the expense of receiving and delivering the property, not according to the space occupied by the property, but according to the value of the property. The fact here is patent that the Storage Company assumed to the bankrupt no liability, and that the sole purpose was to issue warehouse warrants or receipts, making such inspection, only, as in its judgment would protect it from liability to third persons, by reason of the issue of its warrants. To uphold such a scheme would permit every merchant in the state, notwithstanding the declared policy of the state to the contrary, to have possession of large stocks, thereby inducing credit, and to cover them with secret liens, thereby deceiving creditors. It would, in effect, permit such merchant to pledge his entire stock, without change of possession, without record of it, and without notice to the world. Such a scheme is disapproved by the laws of the State of Illinois, which, in this instance, we are bound to uphold, however specious may be the device, or however attractive may be the form, by which it is cloaked. Such a scheme within the State of Illinois is constructively fraudulent as to creditors, and voidable by creditors.

Nor can we uphold this transaction as a pledge of the property to the bank and to H. W. Rogers & Brother. Actual or symbolical possession of personal property in the pledgee is essential to its pledge. It is true that when the actual delivery is to a carrier or warehouseman and bill of lading or warehouse receipt is given

therefor, the transfer of the instrument and its delivery to the pledgee is regarded in the law as delivery of possession to the pledgee of the property represented by the instrument; but it is a necessary condition to the existence of such symbolical possession by the pledgee that the property itself be in the possession of some person other than the pledgor. Two different persons cannot be in the actual adverse possession of the same property or premises at the same time, and as we find the actual possession and actual control of the property in dispute to have been in the bankrupt, the transfer of these warehouse receipts to *bona fide* holders for value, even without notice of the fact, cannot constitute a valid pledge of the goods, as the Storage Company had not possession and control of the goods. *Union Trust Company* v. *Trumbull, supra.*

It is true that it is ruled by the Supreme Court of Illinois, in the case last cited, that such transactions being not in fact, but only constructively, fraudulent, are upheld against general creditors and are only voidable by judgment or attaching creditors, as in the case of an unrecorded chattel mortgage. In such case the lien of the unrecorded mortgage and the title in the case of a conditional sale, and so, also, these storage warrants or receipts in the hands of a *bona fide* holder for value, would be sustained, except as against execution or attaching creditors. It is also ruled that an assignee, under the insolvent law of the state, takes as a volunteer and subject to all liens and equities enforceable against his assignor. *Union Trust Company* v. *Trumbull*, 137 Ill., 146; *Hoover* v. *Burdette*, 153 Ill., 672; *Schwartze* v. *Messinger*, 167 Ill., 427. The rule in some other states of the Union, with respect to the rights of an assignee under the state insolvent law, is different, doubtless arising from the difference in the various insolvent laws. Some of these laws do not prevent suits by creditors: other do. Under some statutes, the assignee represents only the assignor and can assert only the right of the assignor. Under others, the assignee represents the rights of creditors and can enforce their rights without respect of the right of the assignor.

We are therefore brought to the question, whether, under the bankruptcy law, the trustee takes solely in the right of the bankrupt, or whether he also represents the rights which creditors have and the authority to enforce them; whether the petition in bankruptcy is merely the appropriation by the bankrupt of his property to his creditors, or an assertion in behalf of creditors of rights which they had independently of the bankrupt and which he himself could not assert. Notwithstanding some loose expressions in the decisions

upon this subject, we are satisfied, from a careful scrutiny of the act, that the filing of the petition is something more that the dedication by the bankrupt of his property to the payment of his debts; that the trustee is not only invested with the title of the property, but, since after the filing of the petition the creditors are powerless to pursue and enforce their rights, the trustee is vested with their rights of action with respect to all property of the bankrupt transferred by him or encumbered by him in fraud of his creditors, and may assail, in behalf of the creditors, all such transfers and encumbrances to the same extent that creditors could have done had no petition been filed. The filing of the petition, followed by seizure and by adjudication in bankruptcy, is a seizure of the property by the law for the benefit of creditors and an appropriation of it to the payment of the debts of the bankrupt. It is a seizure of the property by legal process, equal in rank to and of the same force and effect as by execution or attachment. This has been held by various courts of appeal, in which decisions we fully concur. *In re Pekin Plow Company*, 112 Fed., 308: *In re Garcewich*, 115 Fed., 87. It is said by the Supreme Court in *Mueller* v. *Nugent*, 184 U. S., 1, 14: "It is as true of the present law as it was of that of 1867, that the filing of the petition is a caveat to all the world and in fact an attachment and injunction."

We have assumed that the bank and H. W. Rogers & Brother are *bona fide* holders, for value and without notice, of these warehouse receipts, giving therefor a full consideration. As against the bankrupt they would be entitled to protection and would be held to have the title to the property; but the issue of these warrants being constructively fraudulent as to creditors of the bankrupt, their right must be upheld subject to the claims of the creditors. These warrants are not commercial paper and are not protected by the law governing that class of instruments.

The decree is reversed and the cause remanded with directions to decree for the trustee.

And afterwards, on the same day, to-wit: On the twenty-second day of April, 1905, in the October terms last aforesaid the following further proceedings were had and entered of record, to-wit:

Wednesday, April 22, 1903.

Court met pursuant to adjournment.

Present:

Hon. James G. Jenkins, Circuit Judge presiding.
Hon. Peter S. Grosscup, Circuit Judge.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, District Judge.

Before:

Hon. James G. Jenkins, Circuit Judge.
Hon. Peter S. Grosscup, Circuit Judge.
Hon. Francis E. Baker, Circuit Judge.

In the Matter of Alexander Rodgers, Bankrupt. Chicago Title and Trust Company, Trustee and James A. Patten, 948. *vs.* First National Bank of Chicago, H. W. Rogers and James C. Rogers as H. W. Rogers & Brother, The National Storage Company and Frank E. Winans.	Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said district court in this cause be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the said district court with directions to enter a decree for the trustee.

And afterwards, to-wit: On the twenty-first day of May, 1903, in the October term last aforesaid, there was filed in the office of the clerk of this court a petition for rehearing.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held at the United States Court-Rooms in the City of Chicago in said Seventh Circuit, on the sixth day of October, 1903, of the October term in the year of our Lord one thousand nine hundred and three and of our Independence the one hundred and twenty-eighth.

And afterwards, to-wit: On the sixth day of October, 1903, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Tuesday, October 6, 1903.

Court met pursuant to adjournment.

Present:

Hon. James G. Jenkins, Circuit Judge presiding.
Hon. Peter S. Grosscup, Circuit Judge.
Hon. Francis E. Baker, Circuit Judge.

In the Matter of Alexander Rodgers, Bankrupt.
Chicago Title and Trust Company, Trustees, etc. *et al.*
948 *vs.*
First National Bank of Chicago, *et al.*

} Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

It is ordered by the court that petition for rehearing in this cause, be, and the same is hereby overruled.

And afterwards, to-wit: On the thirteenth day of October, 1903, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Tuesday October 13, 1903.

Court met pursuant to adjournment.

Present:

Hon. James G. Jenkins, Circuit Judge presiding.
Hon. Peter S. Grosscup, Circuit Judge.
Hon. Francis E. Baker, Circuit Judge.

In the Matter of Alexander Rodgers, Bankrupt.
Chicago Title and Trust Company, Trustees, etc., *et al.*
948. *vs.*
First National Bank of Chicago, *et al.*

Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

Upon motion of counsel for appellees, it is ordered that the mandate in this cause, be, and the same is hereby stayed until further order of court.

And afterwards, to-wit: On the twenty-seventh day of October, 1903, in the October term last aforesaid, there was filed in the office of the clerk of this court, a motion, which motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 948.

Chicago Title and Trust Company, Trustee, and James A. Patten, *Appellants,*
—*vs*—
First National Bank of Chicago, *et al.*, *Appellees.*

And now comes the appellees, and suggest the omission to enter of record, at the time of the submission of this cause, a formal order consolidating this cause with cause No. 949, entitled James A. Patten, appellant, vs. First National Bank of Chicago, et al, appellees,

pending in this court, and move the court that such order be now entered nunc pro tunc as of the 22nd day of January, 1903.

HENRY S. ROBBINS.
Counsel for Appellees

Endorsed: Filed Oct. 27, 1903. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the same day, to-wit: On the twenty-seventh day of October, 1903, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Tuesday, October 27, 1903.

Court met pursuant to adjournment.

Present:

Hon. James G. Jenkins, Circuit Judge presiding.
Hon. Peter S. Grosscup, Circuit Judge.
Hon. Francis E. Baker, Circuit Judge.

Chicago Title & Trust Company, Trustee, and James A. Patten, *vs.* First National Bank of Chicago, *et al.*	Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

948.

It is hereby ordered, on motion of appellees, the appellant hereto consenting without prejudice, that this cause, be, and the same is consolidated with cause No. 949, entitled James A. Patten, appellant, vs. First National Bank of Chicago, et al., appellees, pending in this court; and that this order be entered nunc pro tunc as of the 22nd day of January, 1903.

And afterwards, on the same day to-wit: On the twenty-second day of April, 1903, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Wednesday, April 22, 1903.

Court met pursuant to adjournment.

Present:

Hon. James G. Jenkins, Circuit Judge presiding.
Hon. Peter S. Grosscup, Circuit Judge.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, District Judge.

Before:

Hon. James G. Jenkins, Circuit Judge.
Hon. Peter S. Grosscup, Circuit Judge.
Hon. Francis E. Baker, Circuit Judge.

In the Matter of Alexander Rodgers, Bankrupt. James A. Patten, 949 *vs.* First National Bank of Chicago, W. H. Rogers and James C. Rogers, as W. H. Rogers & Brother, The National Storage Company and Frank E. Winans.	Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, and was argued by counsel

On Consideration Whereof it is now here ordered, adjudged and decreed, by this court, that the decree of the said district court in this cause be, and the same is hereby, reversed with costs; and that this cause, be, and the same is hereby, remanded to the said district court with directions to enter a decree for the trustee.

And afterwards, to-wit: On the twenty-first day of May, 1903, in the October term last aforesaid, there was filed in the office of the clerk of this court a petition for rehearing, in the above entitled cause.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held at the United States Court Rooms in the City of Chicago in said Seventh Circuit, on the sixth day of October, 1903, of the October term in the year of our Lord one thousand nine hundred and three and of our Independence the one hundred and twenty-eighth.

And afterwards, to-wit: On the sixth day of October, 1903, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Tuesday, October 6, 1903.

Court met pursuant to adjournment.

Present:

Hon. James G. Jenkins, Circuit Judge presiding.
Hon. Peter S. Grosscup, Circuit Judge.
Hon. Francis E. Baker, Circuit Judge.

James A. Patten		Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.
949	*vs*	
First National Bank of Chicago, *et al.*		

It is ordered by the court that petition for rehearing in this cause be, and the same is hereby overruled.

And afterwards, to-wit: On the thirteenth day of October, 1903, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Tuesday, October 13, 1903.

Court met pursuant to adjournment.

Present:

Hon. James G. Jenkins, Circuit Judge presiding.
Hon. Peter S. Grosscup, Circuit Judge.
Hon. Francis E. Baker, Circuit Judge.

In the Matter of Alexander Rodgers, Bankrupt. James A. Patten, 949 *vs.* First National Bank of Chicago, *et al.*	Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

Upon motion of counsel for appellees, It is ordered by the court that the mandate in this cause be, and the same is hereby stayed until further order of court.

And afterwards, to-wit: On the twenty-seventh day of October, 1903, in the October term last aforesaid, there was filed in the office of the clerk of this court a certain motion, which motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 949

James A. Patten, *Appellant,*
vs.
First National Bank of Chicago, *et al.*

And now comes appellees, and suggest the omission to enter of record, at the time of the submission of this cause, a formal order consolidating this cause with cause No. 948, entitled Chicago Title and Trust Company, Trustee and James A. Patten, appellants, vs First National Bank of Chicago, et al., appellees pending in this

court, and move the court that such order be now entered nunc pro tunc as of the 22nd day of January, 1903.

HENRY S. ROBBINS,
Counsel for Appellees.

Endorsed: Filed Oct. 27, 1903. Edward M. Holloway, Clerk.

And afterwards on the same day, to-wit: On the twenty-seventh day of October, 1903, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Tuesday, October 27, 1903.

Court met pursuant to adjournment.

Present:

Hon. James G. Jenkins, Circuit Judge presiding.
Hon. Peter S. Grosscup, Circuit Judge.
Hon. Francis E. Baker, Circuit Judge.

	James A. Patten,	Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.
949.	*vs.*	
	First National Bank of Chicago, *et al.*	

It is hereby ordered, on motion of appellees, the appellants hereto consenting without prejudice, that this cause be, and the same is, consolidated with cause No. 948, entitled Chicago Title and Trust Company, Trustee and James A. Patten, appellants, vs. First National Bank of Chicago, et al., appellees, pending in this court; and that this order be entered nunc pro tunc as of the 22nd day of January, 1903.

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the seventh circuit, Greeting:

Being informed that there *is* now pending before you suits in which Chicago Title & Trust Company, trustee, and James A. Patten are appellants and First National Bank of Chicago, H. W. Rogers and James C. Rogers, as H. W. Rogers & Brother, *et al.*, are appellees, No. 948, and James A. Patten is appellant and First National Bank of Chicago, H. W. Rogers and James C. Rogers as H. W. Rogers & Brother, *et al.*, are appellees, No. 949, which suit *was* removed into the said circuit court of appeals by virtue of appeals from the district court of the United States for the northern district of Illinois, and we, being willing for certain reasons that the said cause- and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause-, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the second day of December, in the year of our Lord one thousand nine hundred and three.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 19,130. Supreme Court of the United States. No. 479, October term, 1903. First National Bank of Chicago *et al.*, *vs.* The Chicago Title & Trust Company *et al.* Writ of certiorari. Filed Dec. 21 1903 Edward M. Holloway, clerk.

UNITED STATES OF AMERICA, *Seventh Circuit*, } ss:

In obedience to the foregoing writ, I herewith transmit to the Supreme Court of the United States a true and complete transcript of the record and proceedings in the cases of Chicago Title and Trust Company, trustee, and James A. Patten, appellants, and First National Bank of Chicago, H. W. Rogers, *et al.*, appellees, No. 948; and James A. Patten, appellant, and First National Bank of Chicago, H. W. Rogers, *et al.* appellees, No. 949.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States circuit court of appeals for the seventh circuit, at the city of Chicago, this twenty-eighth day of December, A. D., 1903.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, clerk of the United States circuit court of appeals for the seventh circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 400, inclusive, contain a true copy of the transcript of the record and papers filed (except briefs of counsel and petition for rehearing) and proceedings had thereon, in the United States circuit court of appeals for the seventh circuit, in the matter of Alexander Rodgers, bankrupt, Chicago Title and Trust Company, trustee and James A. Patten *vs.* First National Bank of Chicago, H. W. Rogers, *et al.*, No. 948, and James A. Patten, *vs.* First National Bank of Chicago, H. W. Rogers, *et al.*, No. 949, October term, 1902, as the same remains upon the files and records of the United States circuit court of appeals, for the seventh circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this twenty-eighth day of December A. D. 1903.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

Endorsed on cover: File No. 19,130. Supreme Court of the United States, October term, 1904. No. 139. The First National Bank of Chicago *et al.*, petitioners, *vs.* The Chicago Title and Trust Company *et al.* Writ of certiorari & return. Filed January 13", 1904. (19,130.)

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1903.

THE FIRST NATIONAL BANK OF CHICAGO, H. W. ROGERS and JAMES C. ROGERS, as H. W. ROGERS & BROTHER,
Petitioners,

vs.

THE CHICAGO TITLE & TRUST COMPANY, Trustee of ALEXANDER RODGERS, Bankrupt, THE NATIONAL STORAGE COMPANY, JAMES A. PATTEN, FRANK E. WINANS, and E. W. BAILEY & COMPANY,
Respondents.

PETITION FOR CERTIORARI.

To the Honorable, the Judges of the Supreme Court of the United States:

First National Bank of Chicago, a corporation organized under the laws of the United States, and H. W. Rogers and James C. Rogers, partners, as H. W. Rogers & Brother, respectfully represent unto your Honors:

1. That for some years prior to the 10th day of May, 1903, Alexander Rodgers was a wholesale dealer in seeds in the City of Chicago, Illinois, and that on said day he was adjudged a bankrupt by the District Court of the United States for the Northern District of Illinois, and the Chicago Title and Trust Company, respondent herein, was duly ap-

pointed receiver, and subsequently trustee, of the estate of said bankrupt.

2. That the National Storage Company, respondent, is a corporation organized under the laws of Illinois to do, and is engaged in doing, a warehousing business in the State of Illinois and elsewhere. That some months prior to said 10th day of May, said storage company issued to said Alexander Rodgers sundry warehouse receipts which were similar except as to the quantities and dates; one of which said receipts is in the words and figures following:

Warrant No. 8401. Lot No. 1.

The National Storage Company, office 217 First National Bank Building, Chicago, hereby acknowledges to have received two hundred and fifty (250) bags timothy seed, said to weigh 31,751 pounds, contained in div. B. Sec. 1, Fifth floor, at its warehouse premises No. 281, located at 220-230 Johnson Street, Chicago, Illinois, and will surrender the same to the order hereon of Alexander Rodgers upon payment of charges and delivery of this warrant, at its office in Chicago, duly endorsed.

It is agreed that this Company is not responsible for loss or damage to property occasioned by fire, water, leakage, vermin, ratage, shrinkage, accidental or providential causes, riot or insurrection, frost or change of weather, or from being perishable while in storage, and that this Company shall, in the custody of the above property, be the agent of the holder of this warrant.

Storage and charges as per contract on file with this company, Chicago, August 31, 1900."

Chicago, Aug. 31, 1900.

(Signed) NATIONAL STORAGE COMPANY,
C. B. BOUTON,
President.
WALTER TOD,
Treasurer.

[CORPORATE SEAL]

That immediately thereafter said Rodgers endorsed and hypothecated thirteen of said receipts to your petitioner, the First National Bank of Chicago, to secure loans made by it to him aggregating about $12,000 and endorsed and hypothecated five of said receipts to your petitioners, H. W. Rogers & Brother to secure a loan by them to him of $5,000, and that said loans are still unpaid and due to petitioners respectively, and said petitioners, at the time said Rodgers was adjudged a bankrupt, held and still hold said warehouse receipts as security for said loans respectively.

3. That on the 13th day of May, 1901, said Chicago Title and Trust Company, as said receiver, filed in said District Court (Rec., 5), a petition reciting that it had taken possession of the seed mentioned in said warehouse receipts, and asking the court's directions in respect to a sale thereof. That to said petition each of these petitioners filed a special appearance, specially objecting to the jurisdiction of said District Court over said seed, and such petitioner, as did also said National Storage Company. (Rec., 8-20). That thereupon (Rec., 28) the court referred said petition to a referee to take proof and report his conclusions; that the referee took proof and reported (Rec., 29-45) that the seed covered by said warehouse receipts was, at the time of the adjudication in bankruptcy, in the possession of said Storage Company, that the District Court was without jurisdiction, and recommending a dismissal of said petition.

That subsequently exceptions to said report were heard by said District Court, and it confirmed the referee's finding as to possession, but overruled his finding as to jurisdiction, and held it had jurisdiction, and ordered (the petitioner, First National Bank, consenting) that said

seed be sold and the proceeds thereof be deposited with said First National Bank, subject to the further order of said court (Rec., 54); that said seed was sold, and the amount realized therefrom was in excess of the amounts of petitioners' said claims, and this money is still in the hands of the petitioner, the First National Bank.

That said petitioners thereupon severally filed petitions in said court, asking payment of their said claims out of said proceeds. (Rec., 67-80.) That said Chicago Title and Trust Company, as trustee, and the respondents, James A. Patten, and E. W. Bailey & Company as creditors, answered said petitions, denying the right of your petitioners to said fund; and thereupon said petitions were referred to said referee to take additional proof and report the same to the court (Rec., 109), and the said matter again coming before the court upon the report of said referee and exceptions thereto, said petitions of your petitioners were consolidated, and the court confirmed said report of said referee, except so far as it found a lack of jurisdiction in said District Court, and adjudged that said District Court had jurisdiction; that said decree also found that said Storage Company was, at the time of the filing of the bankruptcy petition herein, in the possession of, and entitled to possession of, said seed, and decreed that petitioner, First National Bank, retain out of said proceeds the sum of $9,854.15 on account of its claim, and pay therefrom to petitioners, H. W. Rogers & Brother, $5,000.

That thereupon said Chicago Title and Trust Company, as trustee, and said James A. Patten severally perfected appeals from said order or decree to the Circuit Court of Appeals of the Seventh Circuit.

That thereafter said two appeals were duly filed in said

Circuit Court of Appeals, and were there, by order of court, consolidated and heard as one case. (Rec., 396, 400.)

That said Circuit Court of Appeals thereafter filed its opinion in said consolidated causes (Rec., 377) reviewing the question of fact whether the Storage Company was in possession of said seed at the time of the proceedings in bankruptcy, and held that said District Court had erred in deciding this question of fact, and overruled said District Court upon said question of fact, and decided that said Storage Company was not in possession of said seed, and remanded said cause with directions to enter a decree for said trustee.

That thereafter these petitioners filed a petition for rehearing in said cause, which was subsequently denied. (Rec., 394.)

That your petitioners are advised by counsel that there existed in law no right of appeal by said trustee or said Patten from said order of said District Court, and that, if said alleged attempts to appeal should be treated strictly as appeals, said Circuit Court of Appeals was without jurisdiction of the subject-matter, and its said order reversing said decree of the District Court was null and void.

That your petitioners are also advised by counsel that, if said appeals rightly could be, and were, treated by said Circuit Court of Appeals as in effect petitions for revision, said Circuit Court of Appeals, by the express terms of the bankruptcy statute, was limited in its jurisdiction to a revision of the decision of the District Court in matter of law, and that said Circuit Court of Appeals, in reversing said District Court upon the said question of fact, proceeded without jurisdiction, and in violation of the said statute.

That your petitioners are advised by counsel that under the law of Illinois, the facts above enumerated created at least an equitable lien upon said seed in favor of each of these petitioners, even if said Storage Company did not properly take and retain possession of said seed, and that the question whether, under the present bankruptcy statute, the trustee takes title subject to, or superior to an equitable lien in favor of creditors, especially where such lien is recognized by the state law, is a question upon which the Circuit Courts of Appeals of the several circuits are in conflict, and that by reason whereof, and because said question is one of gravity and importance, said question ought to be decided by this court.

That your petitioners present herewith and make a part of this petition, a certified transcript of the record of this cause in the Circuit Court of Appeals.

Wherefore your petitioners pray that this court issue a writ of *certiorari* to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, directing it to certify to this court a record of its proceedings in said cause.

FIRST NATIONAL BANK OF CHICAGO, and
H. W. ROGERS & BROTHER,
By HENRY S. ROBBINS,
Their Solicitor.

WALLACE HECKMAN,
Of Counsel.

United States of America
Northern District of Illinois } ss.
Northern Division.

Richard J. Street, being duly sworn, says that he is Cashier of the petitioner, the First National Bank of Chicago; that he has read the foregoing petition and knows the contents thereof, and that the same is true in substance and in fact, except as to those matters therein stated to be upon information and belief, and to those, he believes said petition to be true.

RICHARD J. STREET.

Subscribed and sworn to before me, this 30th day of October, A. D. 1903.

MARTIN HOWARD FOSS,
Notary Public.

[NOTARIAL SEAL]

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1903.

THE FIRST NATIONAL BANK OF CHICAGO, H. W. ROGERS and JAMES C. ROGERS, as H. W. ROGERS & BROTHER,

Petitioners,

vs.

THE CHICAGO TITLE & TRUST COMPANY, Trustee of ALEXANDER RODGERS, Bankrupt, THE NATIONAL STORAGE COMPANY, JAMES A. PATTEN, FRANK E. WINANS, and E. W. BAILEY & COMPANY,

Respondents.

BRIEF ON MOTION FOR CERTIORARI.

A *certiorari* is here sought upon the following grounds:

1st. That the Circuit Court of Appeals was without jurisdiction, as no appeal is provided in such a case.

2nd. That, if the appeal could be treated as a petition for revision, still that court was without jurisdiction because it reviewed and reversed the District Court upon a *question of fact,* when, by the bankrupt statute (Ch. IV, Sec. 24 *b*), its jurisdiction is expressly confined to revision "in matter of law."

3rd. That the question here involved—whether a trus-

tee in bankruptcy takes the estate subject to, or free from, a lien, which, by the state law is valid except as to purchasers without notice, and execution or attachment creditors—is of such general importance, and there is upon it such a conflict of decisions in the different circuits, that this court should settle the question.

4th. That the Circuit Court of Appeals erred in refusing to uphold such a lien in favor of petitioners.

STATEMENT OF FACTS.

The National Storage Company is incorporated under the laws of Illinois to do, and does, a general warehousing business. It belongs to a class of warehousemen which is the product of the modern effort to minimize the cost of transacting business. These warehousemen do not have central warehouses to which all their depositors resort, but lease portions of buildings or yards convenient to factories, take possession thereof, receive and store therein goods which it is inexpedient or too expensive to cart to a distant warehouse, and issue therefor regular warehouse receipts, by the delivery of which the property is conveniently sold or pledged.

This system of warehousing has come into extensive use, especially in the south and elsewhere where business expediency requires iron ore and like bulky goods to be stored. When properly conducted it has received, and we think should receive, the recognition and protection of the law. When not properly conducted and the possession of the warehouseman is not adequately maintained, the law will, and should, refuse to sustain the warehouseman's title.

Alexander Rodgers, for some years prior to being adjudged a bankrupt on May 8, 1901, was a wholesale dealer in seeds in Chicago. About nine months before this date he applied to this company for storage facilities. This resulted in Rodgers executing to the Storage Company a written lease of portions of certain floors of Rodger's business premises. (Rec., 131.)

Upon these leased premises the seeds in controversy were placed, certain signs indicating the Storage Company's control of the premises as a warehouse were posted up and maintained, and upon the written application of Rodgers, the Storage Company issued to him warehouse receipts, of which the following is a sample:

"Warrant No. 8401. Lot No. 1

The National Storage Company, office 217 First National Bank Building, Chicago, hereby acknowledges to have received two hundred and fifty (250) bags timothy seed, said to weigh 31,751 pounds, contained in Div. B. Sec. 1, fifth floor, at its warehouse premises No. 281, located at 220-230 Johnson street, Chicago, Illinois, and will surrender the same to the order hereon of Alexander Rodgers upon payment of charges and delivery of this warrant, at its office in Chicago, duly endorsed.

It is agreed that this Company is not responsible for loss or damage to property occasioned by fire, water, leakage, vermin, ratage, shrinkage, accidental or providential causes, riot or insurrection, frost or change of weather, or from being perishable while in storage, and that this Company shall, in the custody of the above property, be the agent of the holder of this warrant.

Storage and charges as per contract on file with this company. Chicago, August 31, 1900."

CHICAGO, August 31, 1900.

(Signed) NATIONAL STORAGE COMPANY,
C. B. BOUTON, *President.*
[CORPORATE SEAL] WALTER TOD, *Treasurer.*

Thereupon Rodgers endorsed and hypothecated some of these receipts to the petitioner, the First National Bank of Chicago, to secure loans amounting to $12,000, and others to petitioners, H. W. Rogers & Brother, to secure a loan of $5,000.

When thereafter Rodgers was adjudged a bankrupt, the receiver reported to the court that he had taken possession of the seed here in controversy and applied (Rec.,

5) for instructions respecting its immediate sale. Thereupon the petitioner, the First National Bank, filed a pleading which recites its appearance "for the sole purpose of denying the jurisdiction of this court to enter an order as prayed in and by" said petition, and "for the sole purpose of supporting its said objection, shows to the court," etc., and after setting up the facts giving rise to its claim, asks that the petition be dismissed as to said bank and the property covered by its warehouse receipts for want of jurisdiction. (Rec., 11.) At the same time petitioners, Rogers & Brother, filed a similar pleading, as did also the National Storage Company. (Rec., 12, 16.)

Thereupon the District Court, of its own motion, referred the matter to a referee to take proof and report his conclusions.

Subsequently, the referee filed a report in which he found that the bankrupt was not, when the bankruptcy proceeding was begun, in possession of the seed in controversy; that said Storage Company was then in possession thereof, that its said receipts were valid under the laws of Illinois and were transferable by endorsement, and that the endorsement of the receipts by the bankrupt to these petitioners constituted a valid pledge to them of the property represented by such receipts, and that the District Court for that reason was without jurisdiction, and recommending that the petition be dismissed as to the property covered by these receipts. (Rec., 44.)

The District Court overruled the referee's findings as to jurisdiction and sustained its jurisdiction. It then directed a sale of the seed, and the proceeds were placed, and still remain, in the custody of the First National Bank subject to the order of the court.

The question of jurisdiction being thus disposed of, so far as the District Court was concerned, these petitioners and the Storage Company filed supplemental petitions, claiming liens upon the proceeds of the sale. (Rec., 67-82, 100.)

It will thus be seen that neither these petitioners nor the Storage Company did, at any time, "consent" to be sued in the District Court, but in the proper manner and at all proper times objected to its exercise of jurisdiction, and did not enter into a trial on the merits until that court had determined to exercise jurisdiction.

The District Court, on final hearing, confirmed the referee's report, except so far as it found that the bankrupt court was without jurisdiction, and decreed "that the National Storage Company was * * * at the time of the filing of the petition in bankruptcy herein, entitled to possesion and had possession of said property," and that the petitioner, the First National Bank, retain, of the fund in its hands, $9,854.15, with interest, and pay over to the petitioners, H. W. Rogers & Brother, $5,000, with interest.

Thereupon the trustee and James A. Patten (a general creditor of the bankrupt) severally perfected appeals to the Circuit Court of Appeals, which, though severally docketed, were there consolidated (Rec., 396, 400) and disposed of as one case. That court overruled the finding of fact of the District Court that the Storage Company was, when the bankruptcy petition was filed, in possession of the seed in controversy, found from the evidence that it was not so in possession, and upon this ground reversed and remanded, with directions to enter a decree for the trustee.

I.

JURISDICTION OF THE CIRCUIT COURT OF APPEALS.

The first question here is, what is the nature of this proceeding in the District Court?

In *Bardes* v. *Hawarden Bank,* 178 U. S., 524, this court pointed out the distinction between a proceeding in bankruptcy and an independent suit by the trustee in a District Court, and held that the latter could not be brought "unless by consent of the proposed defendant."

As neither of these petitioners consented to be sued in that court, the proceeding there cannot be deemed an independent suit, nor, as such, be the basis of an appeal to the Circuit Court of Appeals under the act establishing those courts.

The Circuit Court of Appeals sustained jurisdiction of the District Court upon the ground that, it having taken possession of the property and converted it into money, the fund was in *custodia legis.*

These petitioners had but a lien upon the property. The title was in the bankrupt at the time of the adjudication—this regardless of the question who was then in possession. The District Court, in seizing it and converting it into money, was acting as a court of bankruptcy. Its only justification for acting was under its authority, as such a court to collect the assets of the bankrupt. This proceeding in the District Court was a part of the bankruptcy proceedings and was so entitled. It follows then that in that court this case was a proceeding in bankruptcy. Indeed, this

same Circuit Court of Appeals has, in a similar case, distinctly so held.

In re Antigo Screen Door Co., 123 Fed., 249, that court, speaking through the same learned judge who wrote the opinion in the case at bar, said:

"Here the petitioner was in possession of property claiming under the chattel mortgages in question. It was agreed that the property should be turned over to the trustee for sale by him, the proceeds to be covered into the registry of the bankruptcy court, the right of property to follow the fund. This being done, and the fund being placed in the registry of the bankruptcy court and in the bankruptcy proceedings, did that court have the right to determine, as a court of bankruptcy and in the bankruptcy proceedings, the respective rights of the parties to that fund? * * * The question remains whether such a proceeding arises strictly on the bankruptcy side of the court, or comes within the general rule governing intervening petitions against a fund in court. * * *

"We are disposed to hold (although the question is one not free from difficulty) that the order is one made in the bankruptcy proceedings proper. * * * The mortgaged property was in equity the property of the bankrupt, subject to such lien as the mortgagee had thereon. If its value was in excess of a valid lien, that excess would go to the trustee. When, therefore, the property was turned over to the trustee as the property of the bankrupt, subject to the lien, the trustee held the property and its proceeds as assets of the bankrupt and in the bankruptcy proceedings. * * * That fund was potentially in the custody of the court in the bankruptcy proceedings as assets of the estate and was subject to the disposition of the bankruptcy court in that bankruptcy proceeding, under section 2 (7) of the bankruptcy act (act July 1, 1898, 30 Stat., 546, c. 541 [U. S. Comp. St., 1901, p. 3421],) which empowers the court to 'cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto except as herein otherwise provided.' We are the more inclined to adopt this construction of the act because thereby a speedy

and inexpensive method is afforded of determining controversies with respect to a fund, and the policy of the bankruptcy act, as we think, sanctions this summary mode of procedure, the parties consenting thereto."

In

Hutchinson v. *Otis,* 190 U. S., 552,

this court held that a petition asserting a lien upon a fund in the hands of a trustee was a bankruptcy proceeding and not an independent ground of appeal.

The proceeding in the District Court being, then, "a proceeding in bankruptcy," the only jurisdiction which the Circuit Court of Appeals had thereof arose out of the following provisions of the bankruptcy act of 1898:

Sec. 24 (*b*): "The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

Sec. 25 (*a*): "That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to wit:

(1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt;

(2) From a judgment granting or denying a discharge; and

(3) From a judgment allowing or rejecting a debt or claim of five hundred dollars or over."

The order of the District Court appealed from was not "a judgment allowing or rejecting a debt or a claim." It merely sustained liens upon a fund ample to discharge them. Petitioners' assertion of a lien upon this fund cannot even be said to be an *incident* to the proof of their claims. The authorities agree that a judgment in a proceeding by

or against a lien holder, which merely establishes or rejects the lien, and does not decide whether a claim is a provable debt in bankruptcy, is not a judgment allowing or rejecting the debt or claim within Sec. 25 (3) above.

In re Rouse, Hazard Company, 33 C. C. A., 356; 91 Fed., 96 (7th Cir.).

In re Worcester County, 42 C. C. A., 637; 102 Fed., 808 (1st Cir.).

In re Abraham, 35 C. C. A., 592; 93 Fed., 767 (5th Cir.).

In re Whitener, 44 C. C. A., 434; 105 Fed., 180 (5th Cir.).

Hutchinson v. *Otis,* 190 U. S., 552.

It follows, then, that no *appeal* lay from the District Court to the Circuit Court of Appeals, and that the only jurisdiction the latter court had was under Sec. 24 *b* upon a petition for revision.

In re Rouse, Hazard & Co., 33 *C. C. A.,* 356; 91 Fed., 96 (C. C. A. of 7th Circuit).

No petition for revision was filed by respondents. They perfected *appeals,* and it was upon these that the Circuit Court of Appeals assumed jurisdiction, and reversed the District Court, and this, not upon a matter of law, but upon the ground that the District Court, in holding possession to have been with the Storage Company at the time of the adjudication, had erred upon the facts.

The procedure upon appeal differs so much from that upon revision that some of the courts hold that an appeal, where there is no right of appeal, cannot be treated as a petition

for revision, but should be dismissed for want of jurisdiction.

In re Whitener, 44 C. C. A., 434; 105 Fed., 180.

In re Worcester County, 42 C. C. A., 637; 102 Fed., 808.

In this view, the Circuit Court of Appeals should, when the point of jurisdiction of the subject-matter was made—and although it was made only in the petition for rehearing—have dismissed the appeals; for in

M. C. & L. M. Ry. Co. v. *Swan*, 111 U. S., 379,

this court said (p. 382):

"The rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

On the other hand, some of the courts hold that the Circuit Courts of Appeals may treat an appeal, when improper as such, as a petition for revision and adjudicate it as such.

Chesapeake Shoe Co. v. *Seldner*, 122 Fed., 593.

If, in this view, the Circuit Court of Appeals was justified, in treating these appeals as petitions for revision,—and it is only in this way that its jurisdiction can be sustained

at all,—still it should not have disregarded, as it did, the plain provisions of the bankrupt act confining its jurisdiction in revision to "matter of law." Indeed, it is an anomalous situation when the same Circuit Court of Appeals at the same time has two similar cases under advisement, each of which it must have treated as a petition for review to justify its jurisdiction, and delivers two opinions by the same judge upon the same day, in one of which (*In re Antigo Screen Company, supra*) it says:

"We are not at liberty upon a petition for review to challenge the facts, or an inference of fact, found by the court below. We may only consider and rule upon a question of law."

while in the other (the case at bar), it reverses, not upon a question of law, but upon the facts.

Thus, in either view, it is clear that the Circuit Court of Appeals has proceeded without jurisdiction and disregarded the plain provisions of the bankrupt act, thereby depriving these petitioners of a large fund in court that is rightfully theirs.

II.

THE QUESTION OF THE SUPERIORITY OF AN EQUITABLE LIEN TO THE TITLE OF THE TRUSTEE IN BANKRUPTCY, AND THE CONFLICT OF DECISIONS THEREON.

Upon the nature and extent of a lien the decisions of the courts of the state where the property is located will be followed by the Federal courts.

Etheridge v. *Sperry*, 139 U. S., 266.
In re Antigo Door Co., 123 Fed. 249, 253, and cases cited.

In the present case the Circuit Court of Appeals conceded that it was "in duty bound to defer to the law of the state in respect of the property within that state."

Under the law of Illinois petitioners had equitable liens upon the seed in controversy, if the Storage Company was derelict in taking or retaining possession. This identical question is conclusively settled by

Union Trust Co. v. *Trumbull,* 137 Ill., 146.

That case involved warehouse receipts of this same Storage Company. The court held that "transfers of the supposed warehouse receipts to the receipt holders were ineffectual to constitute them valid and legal pledges of the wool to secure the debts for which they were hypothecated, and this, both because the National Storage Company did not have possession and control of the wool, and because the wool mentioned in each receipt was not so set apart and distinguished from other wool as that it could have been found and identified by the receipt." * * *

"It is, however, insisted, that even if there was no valid legal pledge of the wool which was in the warehouse at the time of the assignment, yet that, under the circumstances of the case, the holders of the warehouse receipts are entitled to an equitable lien thereon, which, although not recognizable at law, a court of chancery will enforce. * * * These receipts were issued by a duly incorporated storage company, and expressly stated upon their faces that the company had received and was in possession of the number of pounds of 'unwashed wool.' * * * The receipts, upon their faces, indicated that the storage company had complied with the law. * * * The receipt holders were without notice of any fact in derogation of the validity of their receipts. There was an intention and an ineffectual attempt

to secure the repayment of the borrowed moneys by creating valid legal pledges. Equity regards that done which ought to be done. * * *

"It is to be noted that the holders of the receipts stand upon a very different footing from that upon which the National Storage Company stands. They were entirely ignorant of the illegal arrangements which were entered into between that company and the firm of T. W. Hall & Co. in respect to possession, substitution, etc., and they stand before the court in the attitude of the victims of the frauds which it is the intention of the statute to guard against. * * * In Powell on Mortgages, 459, it is said:

'It is a general rule, that whenever a right in equity attaches against a person, that equitable right binds all persons claiming under or against that person who have not special liens on any of the property, and hence it follows that general creditors are in all cases bound by a particular equity.'"

The court then sustained equitable liens in favor of those receipt holders against an assignee for the benefit of creditors.

Even if in the case at bar the Storage Company be held to have inadequately taken or retained possession, there is nothing in the record to show that these petitioners knew of this, or participated in any way in it. Warehouse receipts, legal in form, are presented to them by Rodgers as security, and they in perfect good faith and without the slightest knowledge that the receipts were not the valid evidences of legal title they purported to be, made the loans here involved. Under the foregoing case they thereby acquired under the Illinois law at least an equitable lien upon this seed. There were no exe-

cution or attachment creditors when the petition in bankruptcy was filed or Rodgers was adjudged a bankrupt.

Furthermore, if the Storage Company did not have possession, Rodgers knew it when he obtained the loans, and was guilty of a legal fraud upon these petitioners. These facts would estop Rodgers from claiming that these receipts were not valid pledges. The question is thus raised whether an estoppel, binding upon the bankrupt, is not also binding upon his trustee in bankruptcy. If not, then the trustee and creditors are permitted to profit by the misconduct or fraud of the bankrupt.

The following cases hold a trustee in bankruptcy estopped when the bankrupt is:

In re Standard Laundry Co., 116 Fed., 476.
Pennington v. *Hunt*, 20 Fed., 195.

Upon the question whether the trustee in bankruptcy takes subject to equitable liens, etc., the decisions in the different circuits are in direct conflict.

In re New York Economical Printing Co.,
49 C. C. A., 133; 110 Fed., 514,

the Circuit Court of Appeals of the Second Circuit held that a chattel mortgage, which had ceased to be valid as against the mortgagor's creditors or purchasers because not re-filed within a year, as required by the New York statute, was a lien that was superior to the title of the trustee. The court said:

"It remains to consider whether the trustee can take advantage of the noncompliance with the statute. It has always been held by the courts of New York that only such creditors can take advantage of it as are armed with some legal process authorizing the seizure of the mortgaged property, and are thereby in a position to enforce a lien upon it

[citing New York cases], and that the mortgage is good as to creditors at large as well as between the parties. * * *

The bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present act, like all preceding bankrupt acts, contemplates that a lien good at that time as against the debtor and as against all of his creditors shall remain undisturbed. If it is one which has been obtained in contravention of some provision of the act, which is fraudulent as to creditors, or invalid as to creditors for want of record, it is invalid as to the trustee; and if it is one which was invalid as to some particular creditor, though valid as to other creditors, the trustee is in certain cases subrogated to the rights of that creditor. The provisions which have been quoted do not necessarily touch a lien which at the date of the adjudication of bankruptcy was valid as to the bankrupt, and could not then be disturbed by any of his creditors. The lien of the present mortgage 'would not have been valid as against the claims of the creditors', within the terms of subdivision 'a', if the creditors had obtained the right to question it; but otherwise it was valid. * * * We think these provisions ought not to be extended by construction to cover cases which are not distinctly within their terms, for the purpose of subverting liens which have originated in good faith, which have remained unchallenged at the time of the commencement of the bankruptcy proceeding, and which no creditor of the bankrupt could ever have attacked successfully except at the option of the debtor. We conclude that, except as to the Reilly judgment, the lien of the mortgage was valid, and that the trustee is entitled only to the amount of that judgment out of the proceeds in the registry of the court."

The same court announced the same rule in

In re Garcewich, 53 C. C. A., 510; 115 Fed., 87,

saying:

"Under the present bankrupt act, as under previous bankrupt acts, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition

that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provision of the act."

The court pointed out the distinction between a *bona fide* lien and attempts to reserve liens which were fraudulent in law, and held the lien in that case not valid as against the trustee because, by the agreement, a lien was attempted to be created upon a stock in trade which the bankrupt was allowed to sell, and likened such a transaction to a chattel mortgage where the right of the mortgagor to retail goods was reserved.

In

In re Standard Laundry Company, 53 C. C. A., 644; 116 Fed., 476,

the Circuit Court of Appeals of the Ninth Circuit held that, when a bankrupt had bought property by bill of sale subject to a chattel mortgage which he assumed to pay, a lien was thereby created that was valid as against the trustee in bankruptcy, although the mortgage was void as to creditors because not executed in accordance with the California chattel mortgage statute. The court said:

"The transaction between Muller and the Standard Laundry Company was *bona fide*. The Standard Laundry Company bought the property in good faith subject to the mortgage. By the terms of its purchase of the property it is estopped from denying the validity of the mortgage or of its own obligation to Muller. In a case of this character the trustee, representing the creditors, stands in the shoes of the laundry company, and is in privity with it, so far as the title of the property is concerned. He has the same rights that the laundry company has; no more. As the bankrupt is estopped from denying the validity of the mortgage, so is the trustee,"

and, after a review of the cases, held that the trustee in bankruptcy, under the present statute, takes title, as did the assignee under the former act, subject to equities and liens which exist against the property in the hands of the bankrupt.

In

Josephson, 116 Fed., 404,

the District Court for the Western District of Georgia held that the trustee in bankruptcy took property subject to the lien of an unrecorded chattel mortgage, which was valid *inter parties* under the law of Georgia, Judge Speer saying:

"This is a contest between equities. * * * It is quite clear that no court of the United States would be justified in concluding that congress intended to change with radical purpose the property laws of a state unless that purpose can be gathered from explicit and unequivocal terms of the act of congress. * * * It also may be said that if congress should, by sweeping enactments, declare that every lien, by means of which the commercial and agricultural people in many states of the Union obtain credit, should necessarily be placed upon record, in view of their slender means it would practically destroy their capacity to take part either in commerce or in manufacture or to carry on their agricultural operations successfully. This is true particularly of the southern states. The legislature of each state clearly understands the necessity of its own people. The legislature has the right to determine whether it is best to have these liens recorded."

In

Chattanooga Bank v. *Rome Iron Co.*, 102 Fed., 755,

Judge Newman of the Northern District of Georgia upheld, as against the trustee in bankruptcy, an equitable lien upon an equity in property stored with a storage company similar to the National Storage Company, saying (p. 759):

"Since the argument of this case I have been handed by

counsel for the trustee a recent decision by Judge Bellinger, of Oregon, in the case of *In re J. S. Booth*, 3 Am. Bankr. Rep., 574, 98 Fed., 975, in which it is said, without citing authority, that the trustee in bankruptcy stands in the position of an innocent purchaser without notice. If this is the law, it would seem to defeat this lien, because it seems entirely clear that an innocent purchaser from the Rome Iron Company, without notice of the pledge of the Chattanoooga National Bank, would have obtained a good title; but I must, with the utmost respect, differ with Judge Bellinger as to his opinion of the position in this respect of a trustee in bankruptcy."

And after comparing the present bankrupt act with that of 1867, and the decisions under the latter, he proceeds:

"I am unable to see how any distinction can be drawn, favorable to the contention of counsel for the trustee, between the two acts. The purpose of both acts, although different language is used, seems to be to vest in the trustee the title to the entire estate of the bankrupt; and no distinction can be perceived which justifies the inference that under the last act the trustee takes the property of the bankrupt as an innocent purchaser, without notice, and that in the former he did not."

In

In re Hinsdale, 111 Fed., 502,

there was a conditional sale of property which, by the statute of Vermont, was not, unless recorded, "valid against attaching creditors or subsequent purchasers," but the court (Wheeler, D. J.) held it valid as against the trustee in bankruptcy, saying:

"This statute applies only to such as come within its description. * * * The trustee is neither an attaching creditor nor subsequent purchaser, but is a successor, like an executor or administrator, taking the title of the bankrupt."

In

In re Sewell, 111 Fed., 791,

the District Court of Kentucky (Cochran, D. J.), held that a conditional sale, that by the statute of Kentucky was not valid against cerditors until recorded (this statute being construed to mean only creditors who had acquired liens), was, although not recorded, valid as against the trustee in bankruptcy, saying (p. 794):

"That an assignee in bankruptcy takes the property assigned subject to any liens on it that might have been asserted against it in the hands of the assignor, other than such as are avoided by the bankrupt act itself, has been decided by the Supreme Court in the case of *Stewart* v. *Platt*, 101 U. S., 731; 25 L. Ed., 816."

On the other hand, the Circuit Court of Appeals of the Seventh Circuit in this case holds the title of the trustee in bankruptcy superior to that of the petitioners, and is supported in this by other Federal courts, including the Circuit Court of Appeals of the Eighth Circuit.

The Circuit Court of Appeals holds in effect that the filing of a petition in bankruptcy, followed by adjudication "is a seizure of the property by legal process, equal in rank to and of the same force and effect as an execution or attachment. * * * It is said by the Supreme Court in *Mueller* v. *Nugent*, 184 U. S., 1-14, 'It is as true of the present law as it was of that of 1867, that the filing of the petition is a *caveat* to all the world and in fact an attachment and injunction."

That court seems to base its decision in the present case upon what this court said in the *Nugent* case, failing to notice that the facts in the two cases are entirely different. In the *Nugent* case the trustee in bankruptcy sought by summary proceeding to recover property in the hands of an *agent* of the bankrupt. This court, in using the language above quoted, refers to the case of *Bank* v. *Sherman*, 101 U. S., 403. That was a case in which the only question involved was whether the title of the assignee in bankruptcy

was superior to a conveyance made after the petition, and before the adjudication, and this court held, as respects this situation, that "the filing of the petition was a *caveat* to all the world. It was in effect an attachment and injunction."

But this court held under the bankrupt act of 1867, that the assignee took "subject to all legal and equitable claims of others not in fraud of the rights of general creditors. They would be affected by all the equities which could be urged against him."

Houselt v. *Harrison,* 105 U. S., 401, 406.
Yeatman v. *Savings Inst.,* 95 U. S., 764.
Stewart v. *Platt,* 101 U. S., 731.

Under these cases it is plain that under the act of 1867 the equitable lien of these petitioners would have prevailed against the assignee in bankruptcy.

Thus the Circuit Court of Appeals seems to have decided this case upon an erroneous conception of the construction which this court has put upon the act of 1867.

This conflict in the decisions of the different circuits seems to present a case for *certiorari* in order to secure uniformity of laws, which is mentioned as a ground of *certiorari* in *Forsyth* v. *Hammond,* 166 U. S., 506-14.

That writs of *certiorari* may be issued from this court in bankruptcy cases is beyond dispute.

Bankr. Act of 1898, ch. 4, sec. 25d.
Bryan v. *Bernheimer,* 181 U. S., 188.

Respectfully submitted in the belief that the writ of *certiorari* should issue.

WALLACE HECKMAN,
HENRY S. ROBBINS,
Counsel for Petitioners.

No. 479.

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SUPREME COURT

ADDENDUM TO PETITIONERS' BRIEF ON MOTION FOR CERTIORARI IN

The First National Bank of Chicago, et al.
vs.
The Chicago Title & Trust Company, Trustee, et al.

As further illustrating the conflict of decisions in the different Circuit Courts of Appeal upon the question of the character and extent of the title of the trustee in bankruptcy, we call attention to a decision (just published) of the Circuit Court of Appeals of the Third Circuit, in

First Nat'l Bank v. *Pennsylvania Trust Co.*,
124 Fed., 968.

There a bank made a loan to a steel company, taking as security a bill of sale of a quantity of steel billets, set apart on the premises of the company and marked with signs as the banks' property. After the loan, but without the knowledge of the bank, these signs were removed, but it caused them to be replaced before the bankruptcy, and the Circuit Court of Appeals held the bank's lien superior to the title of the trustee in bankruptcy, saying:

> "It may be that an innocent purchaser for value, or a judgment creditor without notice, might, by execution and levy, have acquired a prior lien; but surely, as against the pledgor, the bank's lien remained, notwithstanding the removal of the signs. Neither the general creditors nor the receiver of the bankrupt could acquire any better title to any property of the bankrupt than the bankrupt himself had at the time of filing the petition in bankruptcy, and therefore the lien was good as against them. The receiver in bankruptcy, standing in the place of the trustee, takes the property in question "as a purchaser from the bankrupt, with notice of all outstanding rights and equities." Whatever the bankrupt might do to make the property available to the general creditors, he may do nothing more, except that he may sue for and recover that which was conveyed in fraud of creditors."

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1903.

THE FIRST NATIONAL BANK OF CHICAGO, H. W. ROGERS and JAMES C. ROGERS, as H. W. ROGERS & BROTHER,
Petitioners,

vs.

THE CHICAGO TITLE & TRUST COMPANY, Trustee of ALEXANDER RODGERS, Bankrupt, THE NATIONAL STORAGE COMPANY, JAMES A. PATTEN, FRANK E. WINANS, and E. W. BAILEY & COMPANY.
Respondents.

REPLY BRIEF ON BEHALF OF PETITIONERS.

The brief of respondents' counsel emphasizes the necessity for an authoritative decision by this Court as to the extent of the jurisdiction of the Circuit Court of Appeals in proceedings arising out of bankruptcy laws.

Counsel disagree with the Circuit Court of Appeals, whose decision they are here seeking to sustain. That court decided in a case similar to the one at bar, (*In re Antigo Screen Door Co.*, 123 Fed., 249) that a proceeding such as the one here is strictly a proceeding in bankruptcy, while counsel in their brief contend that it is not such, but an independent suit from which there exists a general right of appeal

to the Circuit Court of Appeals, and thence to this court, and, because there is such right of appeal to this court a writ of *certiorari* does not lie. This position is founded upon the proposition that the proceeding in the District Court was one brought with the consent of the defendants, petitioners herein. Counsel reach this result by treating the proceeding in the District Court as in fact two suits. Their argument is that, while petitioners objected to the petition filed by the receiver in bankruptcy on the ground of jurisdiction, and thus did not consent to that proceeding, still, having, after the court had thus decided to exercise jurisdiction and dispose of the property, filed a petition to assert their right in the property and its proceeds, this was tantamount to consenting to the proceeding.

This view seems untenable. The two petitions are in effect but one proceeding. The second petition is virtually but a cross petition. Thus the petitioners objected to being sued in the District Court concerning this property until the court had decided to entertain the suit, and then for the first time assented to a decision upon the merits. Can this be construed as a consent by petitioners to being sued in the District Court? What else could petitioners do? The court had taken possession of the property on which they had a lien, and proposed to sell it and dispose of its proceeds. Certainly petitioners were not obliged to refrain from a participation in the trial on the merits in order to preserve the question of jurisdiction upon appeal. In

Louisville Trust Co. v. Comingor, 184 U. S., 18,

a party was ruled to show cause why he should not turn over money to the receiver in bankruptcy, and the proceedings having continued thereafter to a final order, the lower

court held that "by long acquiescence in that mode of procedure, respondent must be regarded as having consented thereto". But this court held otherwise, saying:

"If the jurisdiction of the District Court was not consented to, then the state court, under the circumstances of this case, was the proper forum, and the matters in dispute were to be disposed of there.

The District Court held that Comingor had voluntarily accepted its jurisdiction, and that he had also consented that the court might proceed against him summarily * * * We are of opinion that even if Comingor could have consented to be pursued in this manner, he did not so consent. He was ruled to show cause, and the cause he showed defeated jurisdiction over the subject matter, that is jurisdiction to proceed summarily. He did not come in voluntarily, but in obedience to peremptory orders, and although he participated in the proceedings before the referee, he had pleaded his claims in the outset, and he made his formal protest to the exercise of jurisdiction before the final order was entered".

Thus it seems settled that where a defendant has once objected to the jurisdiction, and this objection is disregarded by the court, he may thereafter proceed to the protection of his rights in that proceeding without being held to consent to it within the meaning of the bankruptcy act.

Counsel also say that the question whether a proceeding in the Circuit Court of Appeals was an appeal or a petition for review was simply a question of form. The same might be said of an appeal and writ of error, yet this court has held that the distinction is an essential one and that a writ of error cannot be treated as an appeal or *vice versa*.

The cases of *Scott & Co.* v. *Wilson*, 115 Fed., 284, and *Stelling v. Jones Lumber Co.*, 116 Fed., 261, cited by counsel, will be found on investigation to be cases wherein the

defendant had consented to be sued in the district court, and had at no time interposed any objection thereto.

Counsel also seem to contend that in bankruptcy proceedings there is an appeal to the Circuit Court of Appeals in other cases than those specified in the Bankrupt Act. If such were the fact, it is difficult to understand why section 25a was passed limiting appeals to certain specified cases.

Counsel also devote much time to a discussion of the facts arising upon the merits of the case. As this seems out of place in an application for *certiorari*, where the question is not whether a certain question was decided correctly below, but whether the question, being a substantial one, is of a character to justify its consideration by this court. Upon the question of possession the referee and the District Court found the facts one way and the Circuit Court of Appeals reached a contrary conclusion. This is sufficient to show that the question is a substantial one.

Respectfully submitted,

WALLACE HECKMAN,
HENRY S. ROBBINS,
Counsel for Petitioners.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1903.

THE FIRST NATIONAL BANK OF CHICAGO, H. W. ROGERS and JAMES C. ROGERS, as H. W. ROGERS & BROTHER, *Petitioners*, vs. THE CHICAGO TITLE & TRUST COMPANY, Trustee of Alexander Rodgers, Bankrupt, JAMES A. PATTEN, et al., *Respondent*.	Petition for Certiorari.

BRIEF OF PETITIONERS IN OPPOSITION TO MOTION TO QUASH.

Petitioners resist this motion to quash upon the following grounds:

I.

THE QUESTION RAISED BY THIS MOTION HAS ALREADY BEEN DECIDED BY THE COURT AGAINST RESPONDENTS.

The ground of this motion to quash is, that this is not a case for *certiorari*, because the proceeding in the District Court was not a "proceeding in bankruptcy," but an independent or plenary suit, in which an

appeal lay to the Circuit Court of Appeals and from that court to this.

Identically the same question was presented upon the application for *certiorari*. Respondents filed a brief in resistance of the granting of a *certiorari* herein, in which they stated (brief, pp. 12-19):

"The petitioners had a right to carry the case from the Circuit Court of Appeals to this court by appeal or writ of error, and there is no occasion or necessity for a writ of certiorari.

a. The controversy in the District Court was in the nature of an independent or plenary suit, presented on the equity side of the court under its general powers, and the right of appeal existed under Section 24 (a) of the Bankruptcy Act.

b. There was such right of appeal, also, under Section 6 of the Act of 1891, creating the Circuit Courts of Appeals which is not abridged by the Bankruptcy Act. * * *

The following cases illustrate what is a controversy or suit, not a part of administrative proceedings merely, and what is appealable and reviewable upon the facts as well as law."

We insert here but a skeleton of this argument.

On the other hand, petitioners contended in their brief as follows (pp. 7, 9, 10):

"As neither of these petitioners consented to be sued in that court, the proceeding there cannot be deemed an independent suit, nor, as such, be the basis of an appeal to the Circuit Court of Appeals under the act establishing those courts. * * *

The proceeding in the District Court being, then, 'a proceeding in bankruptcy,' the only jurisdiction which the Circuit Court of Appeals had thereof arose out of the following provisions of the bankruptcy act of 1898. * * *

It follows, then, that no *appeal* lay from the District Court to the Circuit Court of Appeals, and that the

only jurisdiction the latter court had was under Sec. 24b upon a petition for revision."

Thus this identical question was raised upon the application for a *certiorari*. If the position now, and then, taken by respondent is sound, it was a complete answer to the application, and in granting the *certiorari*, this court necessarily decided the question against respondents.

The one year in which petitioners might have perfected an appeal having expired, respondents seek again to raise this question. Our contention is that respondents are now in no position to do so.

The right of the court of its own motion to raise the question again we need not consider or deny. We do, however, contend, that, as the question has once been raised by respondents, this court may properly consider it as settled for this case, and should do so in view of the fact that petitioners, in reliance upon the fact that this court had exercised its jurisdiction to issue the writ over the objections of respondents that it was not a case for *certiorari*, had allowed the year for appealing to expire without doing so.

Again, even if the court should now be of the opinion that this is not a proper case for *certiorari*, it might well now be treated as here upon appeal. This concerns merely a question of *method*. The scope of the court's jurisdiction to consider and dispose of the case is the same whether here by *certiorari* or by appeal.

II.

THIS IS A CASE FOR CERTIORARI.

As already stated, the only basis of this motion is that this case, when in the District Court, was an independent suit, as distinguished from a proceeding in bankruptcy, and that therefore an appeal lay to the Circuit Court of Appeals, and thence here. Thus the controlling question upon this motion is, *what is the nature of the proceeding in the District Court?*

This is to be determined by considering the proceeding as a whole, and not any part of it, nor any particular order in it. Again, it is to be determined by considering what the proceeding, under the law, properly is, and not what the District Court had declared it to be, or attempted to make it; otherwise it would be within the power of the District Court to itself fix, against the provisions of the statute, the nature of the proceeding.

This proceeding originated by the filing, in the District Court, by the receiver in bankruptcy of his petition, entitled in said court and "In the matter of Alexander Rodgers, Bankrupt, In Bankruptcy, No. 5810." It recites (Rec., 5) that the receiver "*has taken possession of*" certain seed, for which there was then an active market, and that it would be of great advantage to the estate and its creditors to have such seed sold immediately, and prayed the direction of the court in the premises, and that, if the sale was made, any liens thereon be transferred to the proceeds. The petition also recites a notice to these petitioners

and others of the presentation of such petition to the court on a certain date. (Rec., 5, 6.)

Thereupon each of these petitioners filed a pleading (Rec., 8-15), reciting an appearance *solely for the purpose of denying the jurisdiction* of the District Court to enter the order prayed, and in support thereof, averring that said seed was not, and never had been, in the possession of said receiver, but was, at the time of, and prior to, the bankruptcy proceedings, in the possession of the National Storage Company, which had issued warehouse receipts therefor, which had been severally endorsed by way of pledge to, and were held by, the petitioners in this court respectively. Each pleading asked that the receiver's petition be dismissed for want of jurisdiction. A similar pleading was filed by the National Storage Company. (Rec., 16 to 20.)

Thereupon the proceeding was, by the court, referred to one of the regular referees in bankruptcy, who, on the 5th of August, 1901, filed an elaborate report (Rec., 29-45), reciting that he had taken a great deal of evidence, and setting out the transactions which had resulted in the disputed claims of possession; that in his opinion "the status could not have been changed by any action of the receiver from what the situation was at the time of his appointment," and that "the bankrupt was not at the date of the filing of his petition in bankruptcy in this case, or at the date of the adjudication in bankruptcy, in possession" of said seed; * * * "and * * * had not at the date of the filing of the petition or the adjudication in this cause, and has not, possesison or right to possession, of said

property;" and recommending that an order to this effect be entered, and that the court could not, in his opinion, "maintain jurisdiction" of such proceeding, and recommending that it be dismissed.

Exceptions were filed by these respondents, and upon the hearing of these, the District Court on August 5th, 1901, entered an order finding that the receiver "received and took possession from the bankrupt peaceably the property in question, * * * and that the court had jurisdiction and possession of the said property in this cause"; sustaining the exceptions to the master's report as to possession and jurisdiction of the court, and, on the agreement of the petitioner, First National Bank, through its attorney, to sell said seed and hold the funds "subject to the further order of the court herein," it was ordered that said bank proceed at once to sell such seed, and report thereon to the court. (Rec., 55.) On the next day an order was entered reserving the rest of said report for further consideration by the court. (Rec., 56.)

On the 13th of September, 1901, the First National Bank filed its report of its sale of the seed and its possession of the proceeds ($15,773.41).

Thereupon on the 16th and 23rd days of September, and the 3rd of October, 1901 (Rec., pp. 67, 80, 100), these petitioners and the National Storage Company filed separate petitions asserting their respective rights in said seed, and asking for the payment of the claims, for which said seed was pledged, out of the proceeds of the said sale, the petition of the National Storage Company, also asking the payment to it of warehouse charges.

On the 11th of October, 1901, on motion of the Trustee, these petitions and answers were consolidated, and the case was referred back to the same referee to take additional proofs, and it was ordered that the matter be heard by the court upon the evidence already taken and any further evidence. (Rec., 109.)

On the 29th of October, 1902, said cause coming on for hearing in the District Court, upon the original report of the referee and exceptions thereto, and the subsequent evidence, an order or decree was entered (Rec., pp. 114-116) confirming the referee's first report, dated August 5, 1901, "except in so far as the same finds a lack of jurisdiction in this court, which jurisdiction is hereby sustained." This decree also finds that "the receiver in this case had *not*, at the time of the filing of its petition herein, to wit, on May 13, 1901, the right of possession" to the seed in controversy, but that "the National Storage Company was, at the said date, and also at the time of the filing of the petition in bankruptcy herein, entitled to possession, and had possession of said property." The decree then orders the money paid to these petitioners respectively except a few dollars paid to the National Storage Company for its storage charges. In other words, the court receded from its prior decision as to possession, but re-asserted its jurisdiction of the case.

Can there, under these circumstances, be any question that this proceeding in the District Court was a *proceeding in bankruptcy?*

In form it is such, and was so regarded by those who instituted it. The initial petition is entitled in

the bankruptcy court. It is in form a petition of a receiver in bankruptcy for directions of the court respecting a sale of property alleged by such receiver to be in *his possession*. It contains no direct prayer for any adjudication of rights, but asks that, if there are any liens, they shall be transferred to the fund arising from the sale—which necessarily involves an adjudication by the bankruptcy court upon the validity and existence of liens.

The case of *Bardes* v. *Hawarden Bank*, 178 U. S., 524, and subsequent cases, hold that the distinction, existing under the prior bankrupt law, between a *proceeding in bankruptcy* "initiated by the petition, and ending in the distribution of assets amongst the creditors, and the discharge or refusal of a discharge of the bankrupt," and an *independent suit* to determine a controversy between the trustee in bankruptcy and a claimant of an adverse interest, is also contemplated by the present bankrupt act. Hence, the decisions under the previous act, as to what constituted an independent suit, and when a proceeding was a part of the bankruptcy case, are in point under the present act.

Under the bankrupt law of 1867 it was well settled that the bankruptcy court was *without jurisdiction* to decide upon adverse claims of property, not in the possession of the assignee in bankruptcy, by summary proceedings—petition and rule to show cause, or notice—and that this was equally so, whether the adverse claim was to the absolute title of the property, or only to a lien thereon. In

Smith v. *Mason*, 14 Wall., 419,

an assignee in bankruptcy under the law of 1867 filed

a petition in the bankruptcy court against a third person, who was in the possession of a fund and claimed it adversely, asking that it be awarded to the assignee. In answer to an order to show cause the claimant set up that "the court had no jurisdiction to proceed against him in that mode," and this court so held, saying:

"Special provision is made for the revision in the Circuit Court of controversies like the one exhibited in this record, and the court is of the opinion that such causes cannot be commenced by a petition for a rule to show cause, as in this case, nor be determined in a summary way by the District Court sitting in bankruptcy, without due process of law. * * *

Suffice it to say, without expressing any opinion as to the weight of the evidence, the appellant claimed the fund as his own property, and if his claim is just and legal, the possession of the depositary was his possession, and if the assignee in bankruptcy would divest him of the possession and control of the fund he must do it by a suit at law or in equity, as provided in the third clause of the second section of the Bankrupt Act."

Marshall v. *Knox*, 16 Wall., 551,

a like summary proceeding, where this court extended this rule to adverse claimants of liens only, saying:

"The case here, then, depends on the question whether the District Court had jurisdiction to proceed by rule as it did. The goods, it has been seen, were in the custody of the sheriff, under a writ of provisional seizure, and held as a pledge for the rent of the lessor. The seizure had been made before the bankruptcy. The landlord claimed the right thus to hold possession of them until his claim for rent was satisfied. This claim was adverse to that of the assignee. The case presented was one of conflicting claims to the possession of goods; and the sheriff had present possession for the benefit of the lessor.

Neither the sheriff nor the lessor was a party to the proceedings in bankruptcy. No process had been served upon them to make them such. They were not before the court; and the court had no control or jurisdiction over them.

Under these circumstances the assignees applied for and obtained from the District Court, a rule on the lessor and sheriff to deliver the goods to them. Had the court authority to make such a rule? Could such a rule be characterized as due process of law? * * *

But it may, with some plausibility, be said that, as the property in this case is conceded to be in the bankrupt, and the question has respect only to the right of possession under the lien, the District Court, which has express jurisdiction of the 'ascertainment and liquidation of the liens and other specific claims' on the bankrupt's property, might properly assume control of the property itself. The claim, however, is to the right of possession, and that right may be just as absolute and just as essential to the interests of the claimant as the right of property in the thing itself, and is, in fact, a species of property in the thing just as much the subject of litigation as the thing itself. * * *

The court is of the opinion, therefore, that the District Court proceeded without jurisdiction in compelling the lessor and the sheriff, under a rule to show cause, to deliver up possession of the goods in question to the assignees."

Other cases illustrative of the application of this rule under the law of 1867, are:

Knight v. *Cheney*, 5 N. B. R., 305; Fed. Cas., No. 7883,

a case involving the right of the bankruptcy court to order, in a summary way, a sale of property claimed by the assignee in bankruptcy, but in the actual possession of a third person claiming it as owner. Mr. Justice Clifford held:

"Cases of the kind before the court, fall directly within the third clause of the section under consideration, and where the property in controversy at the time the debtor was adjudged bankrupt, was in the actual possession of a third person claiming absolute title and dominion of the same, the question of ownership, if the same is claimed by the assignee of the bankrupt, must be determined by a suit in equity or by an action at law, subject to re-examination as provided in the law of the forum where the suit is commenced."

And, in rejecting the contention of counsel that the "district court possessed in this case full power * * * to order that the goods should be sold, and that the proceeds should be held in place of the goods, as the measure of value in any subsequent controversy between the parties," the court said:

"Discretionary power, it must be conceded, exists in the district court to order a sale of the estate of the debtor, where it appears that the title is in dispute, if it also appears that the debtor was in possession of the estate at the time that he was adjudged bankrupt, and that the estate was duly transferred to the assignee and that it remained in his possession at the time the sale was ordered. Grant that the power of sale under that section, extends to such a case as that supposed, still the concession does not sustain the decision of the district court under revision, as the estate in this case was never transferred to the assignee, and was not in his possession at the time the order of sale was passed. On the contrary, it was in the actual possession of the respondent firm, claiming absolute title to, and dominion over the same as their own property. * * *

Viewed in any light, the court is of the opinion that the district court does not possess the power under that provision to order in a summary way the sale of an estate, real or personal, although the same

is claimed by the assignee, even though the title to the same is in dispute, if it also appears that the estate in question is in the actual possession of a third person, holding the same as owner and claiming absolute title to and dominion over the same as his own property, whether derived from the debtor before he was adjudged bankrupt or from some other former owner."

And upon a *petition for revision* the action of the lower court was reversed.

In re Marter, 12 N. B. R., 185; Fed. Cas., No. 9143,

where, upon a summary petition, a general assignee for the benefit of creditors had been enjoined from disposing of the property of the bankrupt in his possession, the assignee violated the injunction and sold the property, and a motion for an attachment for contempt was denied by Mr. Justice Brown upon the ground that the District Court was without power to determine the validity of the assignee's title by summary proceedings, and that the only remedy was by plenary suit at law or in equity.

In re Ballou, 3 N. B. R., 717; Fed. Cas., No. 818,

where property levied upon by execution was by order of the bankruptcy court delivered to the assignee in bankruptcy, and was by him sold subject to the determination of the court as to the validity of the lien claimed by the execution creditor, the assignee filing a petition praying that such lien be declared void, and the creditor filing an answer praying that it be adjudged valid and be paid out of the proceeds, and Mr. Justice Blatchford dismissed the petition, saying:

"The objection was taken, at the hearing, by the

counsel for the firm, that, inasmuch as the proceeding instituted by the petition of the assignee is one against the firm as claiming an adverse interest touching property or rights of property of the bankrupt, transferable to or vested in the assignee, it is wholly irregular, because it was not brought upon a plenary bill in equity, but by a summary petition and an order to show cause. On the authority of the recent decision made in the circuit court for this district, in the case of *In re Bonesteel* [Case No. 1627] this objection must be held to be well taken. As the petition falls, the answer must fall with it, and also the prayer of the answer, that the assignee may be ordered to satisfy the execution out of the proceeds of the sale of the property levied upon."

In re Bonesteel, 3 N. B. R., 517; Fed. Cas., No. 1627,

where, upon petition by an assignee in bankruptcy, against the wife of the bankrupt, the bankruptcy court, in a summary way, had decided that certain stock held by the wife belonged to the bankrupt, and Mr. Justice Nelson, upon *petition for review*, set aside the decree as founded upon irregular proceedings.

See, also:

Barstow v. *Peckham*, 5 N. B. R., 72; Fed. Cas., No. 1064.

Rogers v. *Winsor*, 6 N. B. R., 246; Fed. Cas., 12,023.

Under these cases, the proceeding in the District Court must be regarded as not an independent suit—because, as such, the District Court was without jurisdiction of it—unless there is something in the present bankrupt act which works a change in the law established by these cases.

But the present bankrupt act, instead of modifying, was adopted with reference to, and emphasizes the principles of these cases. Whereas, under the former statute, the District Court was given jurisdiction of independent suits brought either *by* or *against* the assignee in bankruptcy, the present act, as pointed out in *Bardes* v. *Hawarden, supra,* imposes an express restriction upon the jurisdiction of the District Court over independent suits brought *by* the trustee (or receiver) in bankruptcy.

Section 2 of the present act confers jurisdiction upon the District Courts *as courts of bankruptcy,* among other things to "(7) cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, *except as herein otherwise provided.*" The italicized words, as this court has held in *Bardes* v. *Hawarden,* refer to section 23 of the act, the section which relates to the jurisdiction of courts and which provides:

"(b). Suits by a trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

In other words, the present statute in effect declares that the District Courts should not have jurisdiction of an independent suit brought *by* the trustee, when the defendant did not consent, but that the exclusive jurisdiction of such a suit should be in such courts as the bankrupt might have resorted to, if no bankruptcy proceedings had been instituted. Here, then, is an express statutory limitation on jurisdiction.

The fact that, after the court had overruled their objections to jurisdiction, these petitioners and the Storage Company followed the case—as, without a sacrifice, they could not otherwise do—does not amount to a waiver of these objections. Upon this point,

Louisville Trust Co. v. *Comingor,* 184 U. S., 18,

is a direct authority. In that case a rule was entered in the bankruptcy court requiring an assignee for creditors under a state statute to pay to the trustee in bankruptcy a certain sum retained by him for his commissions as assignee, and certain other money by him paid to his attorney. This adverse claimant tendered a formal response denying jurisdiction. This the bankruptcy court refused to entertain, and proceeded to a hearing on the merits, in which the claimant participated. Upon final hearing the bankruptcy court sustained its jurisdiction upon the ground that, by his "acquiescence in that mode of procedure," the claimant had assented to its jurisdiction. Thereupon the claimant filed his *petition for review* in the Circuit Court of Appeals, and upon a decision by that court, *this court issued certiorari* and affirmed the action of the Circuit Court of Appeals in reversing the bankruptcy court. The Chief Justice, after stating the nature of the claim, said (italics ours):

"This brought the controversy within the ruling in *Bardes* v. *Bank,* 178 U. S. 524, and the questions attempted to be litigated before the referee and in the District Court as to the allowance of the two amounts could only be raised in the District Court by consent, and then only by plenary suit. If the jurisdiction of

the District Court was not consented to, then the state court, under the circumstances of this case, was the proper forum, and the matters in dispute were to be disposed of there. * * *

The proceeding was purely summary. * * *

The question is whether the District Court had jurisdiction to finally adjudicate the merits in this proceeding. * * *

In many cases jurisdiction may depend on the ascertainment of facts involving the merits, and in that sense the court exercises jurisdiction in disposing of the preliminary inquiry, although the result may be that it finds that it cannot go farther. *And where in a case like that before us, the court erroneously retains jurisdiction to adjudicate the merits, its action can be corrected on review.*

We are of opinion that even if Comingor could have consented to be pursued in this manner, he did not so consent. He was ruled to show cause, and the cause he showed defeated jurisdiction over the subject matter, that is jurisdiction to proceed summarily. He did not come in voluntarily, but in obedience to peremptory orders, and although he participated in the proceedings before the referee, he had pleaded his claims in the outset, and he made his formal protest to the exercise of jurisdiction before the final order was entered."

In re Baudouine, 101 Fed., 574; 41 C. C. A., 318.

In that case a trustee in bankruptcy filed a petition, and took a rule to show cause, against certain testamentary trustees in order to secure an adjudication that a certain income, derived by the bankrupt under a will, belonged to his estate. Upon the return of the order to show cause, the trustees appeared—as did the petitioners in the present case—solely for the purpose of objecting to the jurisdiction of the

court, and insisted by demurrer that the court had no jurisdiction. This was overruled, the trustee answered and proceeded to trial upon the merits. The decision was in favor of the trustee in bankruptcy. Thereupon the testamentary trustees filed a *petition for review* in the Circuit Court of Appeals of the Second Circuit, which court reversed the order of the District Court, saying:

"If the testamentary trustees had an interest adverse to the trustee in bankruptcy in the fund sought to be reached in the present suit, they are entitled to be heard in a plenary suit. * * * But where the objection is taken in limine by the respondents, as it was here, it cannot be ignored, and the party who insists upon being heard in a plenary suit is entitled to that mode of procedure."

These two cases are direct authority for the proposition that, by proceeding with the case, after the District Court had overruled their objections to jurisdiction, these petitioners did not waive their right to insist upon them in the appellate tribunals, and that the character of the proceeding in the District Court was not thereby changed.

(See, also, *In re Ballou, supra.*)

These two cases also recognize a procedure, which is in direct conflict with the position of respondents on this motion. Each was removed to the Circuit Court of Appeals by petition for review, and one was brought from that court to this by *certiorari*. If, therefore, as contended by respondents, cases of this kind should go to the Circuit Court of Appeals by appeal, and not by petition for review, and hence should be brought to this court by appeal, and not by *certiorari*, then this court was without jurisdiction in the *Comingor* case.

Knight v. *Cheney* and *In re Bonesteel, supra,*—the law of 1867 not differing from the present act in this respect—were also reviewed by petition of review and not by appeal.

From the foregoing it follows that the proceeding in the District Court cannot be deemed an independent suit, from which an appeal would lie to the Circuit Court of Appeals under the Judiciary Act of 1891, because, by express statute the District Court had no jurisdiction of such a suit.

It does not, however, necessarily follow that this proceeding is to be regarded as *coram non judice* in the District Court. This court will not, we apprehend, so characterize a proceeding in a District Court, unless the record necessarily requires this. If upon any reasonable theory the jurisdiction of the lower court can be sustained, it should be. There is no difficulty in sustaining this proceeding *as a proceeding in bankruptcy.*

Section 2 of the present bankrupt act makes the District Courts "courts of bankruptcy" and invests them with such jurisdiction as will enable them "to exercise original jurisdiction *in bankruptcy proceedings,* to * * * (7) cause the estates of bankrupts to be collected, *reduced to money,* and distributed, and determine controversies in relation thereto, except as herein otherwise provided. * * * Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specified powers not herein enumerated."

This section contains eighteen separate enumera-

tions of powers, not necessary to be here set out. A reference to them will show that every one of them (except clause 4, which confers jurisdiction of crimes against the bankrupt law) relates to the exercise of some power necessary to administer and distribute the bankrupt's estate. The exercise of every power there enumerated would give rise to some order in the bankruptcy case, considering all that takes place between the petition for adjudication and the last order in the case (as suggested by this court in *Lathrop* v. *Drake*, 91 U. S., 516) as one case. Clause 7 is, we conceive, no exception to this statement. The words "except as herein otherwise provided" are words of limitation upon the jurisdiction conferred by section 2 upon district courts *as courts of bankruptcy*, the jurisdiction which they have of independent suits being apparently conferred by other provisions of the statute.

By this clause 7 courts of bankruptcy are given jurisdiction to cause the estates of bankrupts to be collected, *reduced to money*, and distributed, and to determine certain controversies in relation thereto. The law here contemplates that the bankruptcy court, acting through a trustee, may proceed in the *collection* of the estate, until an adverse claimant in possession is reached, when it must stop, unless such claimant consents to have it decide the controversy.

So, too, the bankruptcy courts are by this clause given jurisdiction of proceedings, wherein it is sought to have estates *reduced to money*, and may determine certain controversies that may arise while it is so acting. Under this power it may proceed until a contro-

versy is reached with an adverse claimant in possession, who objects to a hearing in the bankruptcy court, when it must stop. It may be that a proceeding to reduce to money property *in the possession of the trustee* does not create a controversy with an adverse claimant of the property; but where, in a proceeding to sell property, the court finds it to be in the possession of an adverse claimant, its jurisdiction to proceed is at an end by the express provision of the present statute.

This is in perfect harmony with the former bankrupt act, under which, as we have seen, the bankruptcy court was without power to order a sale of property (claimed by the trustee in bankruptcy) which was in the possession of an adverse claimant.

But from this it does not follow that the court is without jurisdiction *ab initio*. It necessarily must have jurisdiction to proceed up to the point of determining that there exists an adverse claim; that is, that the property is in the possession of an adverse claimant.

Louisville Trust Co. v. *Comingor*, 184 U. S., 18.
Mueller v. *Nugent*, 184 U. S., 1.
In re Baird, 116 Fed., 765.
In re Kane, 131 Fed., 386,

are authorities for this proposition.

The necessity for this is well illustrated by the case at bar. This proceeding started in the District Court by the receiver filing a petition which recited that the receiver "has taken possession of the property" in controversy. The petitioners at bar and the Storage Company filed pleadings denying that the property

was in the possession of the receiver, and claiming that it was in that of the Storage Company. Here, then, was a dispute as to possession. If the averments of the receiver's petition were true, the court had jurisdiction to sell. If the claim of the petitioners and the Storage Company were sustained, the court was without jurisdiction to sell, because without possession of the property to be sold. It would seem, therefore, that the District Court, acting as a court of bankruptcy and in a bankruptcy proceeding, was justified in proceeding to determine this controverted fact. This it did through a reference to a referee, whose conclusion against the possession of the receiver and in favor of the possession of the Storage Company the District Court at first rejected, but finally concurred in.

What, in this state of the case, if there had been in the meantime no sale, would have been the proper action for the District Court to have taken? Clearly an order to return the property to the possession of the adverse claimants.

But, because of the protracted hearing of this controversy, the nature of the property, and state of the market, the interests of all parties required that the property, the possession of which was in dispute, should be sold, and the District Court directed one of these adverse clamants to sell the property and hold the money subject to the order of the court. Does this change the situation? Clearly not. The money stood in lieu of the property, and, when the District Court finally decided the possession to be in the adverse claimant, the only order it could properly

make was an order returning the money, as it did, to the adverse claimants.

It would seem, therefore, that the proceedings in the District Court was not *coram non judice,* but that court was, under its power, *as a court of bankrupty,* to proceed to cause the bankrupt's estate to be "reduced to money," acting properly in determining the fact—upon which its jurisdiction in this respect was based—whether the property was or was not in the possession of the receiver, that is, within its jurisdiction. In this view is it not clear that the proceeding was a proceeding in bankruptcy?

The Circuit Court of Appeals sustained the jurisdiction of the District Court upon the ground that the court had acquired a fund and had jurisdiction, as any court would, to dispose of it. (Rec., 388.) In another similar case (*In Re Antigo Screen Door Co.,* 123 Fed., 249) that court also decided that a proceeding, jurisdiction of which rested upon this ground, was a proceeding in bankruptcy.

While this view is in our favor, its reasoning on this point is not altogether satisfactory, because it seems to us that the nature of the proceeding in the District Court is not to be determined by the fact that the court had acquired a fund by an improper sale of property. As already stated, the nature of this proceeding is to be determined by considering it as a whole, and not any one order in it. If a court could create jurisdiction in itself by proceeding, contrary to law, to turn property into money, then it would be in the power of a court of bankruptcy to create jurisdiction in itself

where it really had none. We cannot conceive that a court by its own improper assertion of jurisdiction, can give itself any jurisdiction whatever. If, under a misapprehension, or in ignorance of the real facts, it seizes, through its officers, property and orders it sold, the orderly administration of justice requires that, when it ascertains the real facts, it should return the property to the parties from whom it had improperly taken it. If, pending an investigation of the facts, it reduces the property to money, its duty is the same. To hold that it has any other jurisdiction or power is to create a right to proceed out of an improper act.

What has been said above is sufficient, it is apprehended, to distinguish the case at bar from *Hewit* v. *Berlin Machine Works,* 194 U. S., 296, upon which respondents rely. That was not a proceeding instituted *by* a receiver or trustee in bankruptcy against an adverse claimant in possession of the property, but one brought by the adverse claimant in the District Court to recover possession of property held by the trustee. It did not fall within Section 23b. There was no objection to jurisdiction interposed. The District Court, in deciding the case, did not transcend a statutory limit imposed upon its jurisdiction.

It is therefore respectfully submitted that the motion to quash should be denied.

HENRY S. ROBBINS,
Counsel for Petitioners.

WALLACE HECKMAN,
Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

No. 139.

THE FIRST NATIONAL BANK OF CHICAGO et al.,
Petitioners,
vs.
THE CHICAGO TITLE & TRUST COMPANY, Trustee of Alexander Rodgers, Bankrupt, et al.,
Respondents.

Certiorari to Circuit Court of Appeals for the Seventh Circuit.

STATEMENT.

This cause originated in the District Court at Chicago, and presents questions under the bankrupt act.

Alexander Rodgers, for some years prior to being adjudged a bankrupt on May 8, 1901, was a wholesale dealer in seeds in Chicago, and in such business occupied under lease a portion of a large six-story and basement building in the City of Chicago.

The National Storage Company is an Illinois corporation engaged in warehousing. It has no single or central warehouse, in which it stores together the property of its different customers. Its business is carried

on by taking a lease of a portion or all of the premises occupied by a customer, fixing its name on the premises, or posting notices thereon, and issuing receipts on property stored therein, as hereinafter shown, this method of warehousing being the same as is involved in case No. 424 upon the present docket of this court.

On the 31st of August, 1900, Rodgers applied to this storage company for storage facilities, and executed to it a written lease of portions of certain floors of his premises. (Rec., 131.) Upon these leased premises the seed in controversy was placed, and signs indicating the storage company's control of the premises as a warehouseman, were posted up and maintained, and upon the written application of Rodgers, the storage company issued to him warehouse receipts, of which the following is a sample (Rec., 136):

"Warrant No. 8401. Lot. No. 1

The National Storage Company, office 217 First National Bank Building, Chicago, hereby acknowledges to have received two hundred and fifty (250) bags timothy seed, said to weigh 31,751 pounds, contained in Div. B, Sec. 1, fifth floor, at its warehouse premises No. 281, located at 220-230 Johnson street, Chicago, Illinois, and will surrender the same to the order hereon of Alexander Rodgers upon payment of charges and delivery of this warrant, at its office in Chicago, duly endorsed.

It is agreed that this Company is not responsible for loss or damage to property occasioned by fire, water, leakage, vermin, ratage, shrinkage, accidental or providential causes, riot or insurrection, frost or change of weather, or from being perishable, while in storage, and that this Company shall, in the custody of the above property, be the agent of the holder of this warrant.

Storage and charges as per contract on file with this company. Chicago, August 31, 1900.

(Signed) NATIONAL STORAGE COMPANY,
C. B. BOUTON, *President.*"

Thereupon Rodgers endorsed and hypothecated some of these receipts to the petitioner, The First National Bank of Chicago, to secure loans amounting to $12,000, and others of said receipts to petitioners, H. W. Rogers & Brother, to secure a loan of $5,000.

This proceeding originated by the filing, in the District Court, by the receiver in bankruptcy of a petition, entitled in said court and "In the matter of Alexander Rodgers, Bankrupt, In Bankruptcy." It recites (Rec., 5) that the receiver "*has taken possession of*" certain seed, for which there was then an active market, and that it would be of great advantage to the estate and its creditors to have it sold immediately, and prayed the direction of the court, and that, if the sale was made, any liens thereon be transferred to the proceeds. The petition also recites a notice to these petitioners and others of the presentation of such petition to the court on a certain date. (Rec., 5, 6.)

Thereupon each of these petitioners filed a pleading (Rec., 8-15), reciting an appearance *solely for the purpose of denying the jurisdiction* of the District Court and averring that said seed was not, and never had been, in the possession of said receiver, but was, at the time of, and prior to, the bankruptcy proceedings, in the possession of the National Storage Company, which had issued warehouse receipts therefor, which had been severally endorsed by way of pledge to, and were held by, these petitioners respectively. Each pleading asked that the receiver's petition be dismissed for want of jurisdiction. A similar pleading was filed by the National Storage Company. (Rec., 16 to 20.)

Thereupon the proceeding was, by the court, referred

to one of the regular referees in bankruptcy, who, on the 5th of August, 1901, filed an elaborate report (Rec., 29-45), setting out the transactions which had resulted in the disputed claims of possession, and that "the bankrupt was not, at the date of the filing of his petition in bankruptcy in this case, or at the date of the adjudication of bankruptcy, in possession" of said seed; and recommending that the proceeding be dismissed for want of jurisdiction.

The District Court on August 5th, 1901, entered an order finding that the receiver "received and took possession from the bankrupt peaceably the property in question, * * * and that the Court had jurisdiction and possession of the said property in this cause," and sustaining the exceptions to the referee's report as to possession and jurisdiction of the court. Thereupon, on the agreement of the petitioner, First National Bank, to sell the seed and hold the proceeds "subject to the further order of the Court herein," it was ordered that it proceed at once to sell such seed, and report thereon to the court, and the court reserved the rest of said report for further consideration. (Rec., 55-56.)

The First National Bank having sold the seed for $15,773.41, these petitioners and the National Storage Company filed separate petitions re-asserting their respective rights in said seed, and asking for the payment of the claims, for which it was pledged, out of these proceeds, the petition of the National Storage Company, also asking the payment to it of its warehouse charges. (Rec., 67, 80, 100.)

On motion of the Trustee, these petitions and answers were consolidated, and the case was referred

back to the same referee to take additional proofs. (Rec., 109.)

The cause then coming on for hearing in the District Court, upon the original report of the referee and exceptions thereto, and the subsequent evidence, an order or decree was entered (Rec., pp. 114-116) confirming the referee's first report, "except in so far as the same finds a lack of jurisdiction in this Court, which jurisdiction is hereby sustained." This decree also finds that "the receiver in this case had *not*, at the time of the filing of its petition herein, * * * the right of possession" to the seed in controversy, but that "the National Storage Company was at the said date, and also at the time of the filing of the petition in bankruptcy herein, entitled to possession, and had possession of said property." The decree then orders the money paid to these petitioners respectively except a few dollars paid to the National Storage Company for its storage charges. In other words, the court receded from its prior decision as to possession, but re-asserted its jurisdiction of the case.

From this order or decree the respondents perfected an *appeal* to the Circuit Court of Appeals, and that court, treating the appeal as conferring on it jurisdiction to review and revise the questions of fact resolved by the referee and the District Court in favor of these petitioners, decided that no adequate possession had been taken and maintained by the storage company; that the transactions resulting in the issuance of warehouse receipts were fraudulent and voidable by the trustee, and that, if an equitable lien arose under the

Illinois law, it did not prevail against the title of the trustee who, in this respect, stood in the same position as an attaching creditor. (See opinion, Rec., pp. 377, 392; also reported in 125 Fed., 169.)

Thereupon these petitioners were granted this writ of certiorari.

BRIEF OF ARGUMENT.

I.

THIS CASE IN THE DISTRICT COURT WAS A PROCEEDING IN BANKRUPTCY.

What is the scope of the inquiry presented by this record to this court?

This depends upon the question, to what extent, if any, the Circuit Court of Appeals had power to review the order of the District Court.

The question of the jurisdiction of the Circuit Court of Appeals in turn depends upon the character of the proceeding in the District Court. If, under the distinction pointed out in *Bardes* v. *Hawarden Bank*, 178 U. S., 524, this was, in the District Court, a proceeding in bankruptcy, and not an independent suit, no *appeal* lay to the Circuit Court of Appeals, and that court, if it could review the case at all, could only do so by treating it as a petition for review, in which event its right to review was confined by the statute to questions of law.

What, then, was the character of the proceeding in the bankruptcy court?

In form it was a proceeding in bankruptcy, and was so regarded by those who instituted it. The initial petition is entitled in the bankruptcy court. It is a petition of a receiver in bankruptcy for directions of the court respecting a sale of property alleged by such receiver to be in *his possession*. While it contained no direct

prayer for any adjudication of rights, it asked that, if there were any liens, they should be transferred to the proceeds—which necessarily involved an adjudication upon the validity and existence of liens.

Bardes v. *Hawarden Bank,* 178 U. S., 524, and subsequent cases, hold that the present statute retains the distinction, existing under the prior bankrupt law, between a *proceeding in bankruptcy* "initiated by the petition, and ending in the distribution of assets amongst the creditors, and the discharge or refusal of a discharge of the bankrupt," and an *independent suit* to determine a controversy between the trustee in bankruptcy and a claimant of an adverse interest. Hence, the decisions under the earlier act, as to what constitutes an independent suit, are in point under the present act.

Under the law of 1867 the bankruptcy court was *without jurisdiction* to decide upon adverse claims to property, not in the possession of the assignee in bankruptcy, by summary proceedings—petition and rule to show cause, or notice—whether such claim was to the absolute title of the property, or only to a lien thereon. In

Smith v. *Mason,* 14 Wall., 419,

an assignee in bankruptcy filed a petition in the bankruptcy court against a third person, in the possession of a fund and claiming it adversely, asking that it be awarded to the assignee. In answer to an order to show cause the claimant set up that "the court had no jurisdiction to proceed against him in that mode," and this court so held, saying:

"Special provision is made for the revision in the Circuit Court of controversies like the one exhibited in this record, and the court is of the opinion that such causes cannot be commenced by a petition for a rule to show cause, as in this case, nor be determined in a summary way by the District Court sitting in bankruptcy, without due process of law. * * *

Suffice it to say, without expressing any opinion as to the weight of the evidence, the appellant claimed the fund as his own property, and if his claim is just and legal, the possession of the depositary was his possession, and if the assignee in bankruptcy would divest him of the possession and control of the fund he must do it by a suit at law or in equity, as provided in the third clause of the second section of the Bankrupt Act."

Marshall v. *Knox,* 16 Wall., 551,

a like summary proceeding, where this court extended this rule to adverse claimants of liens only. In that case the goods were in the custody of the sheriff, under a writ of provisional seizure, and held as a pledge for the rent of the lessor. The seizure had been made before the bankruptcy of the tenant.

This court said:

"The court is of the opinion, therefore, that the District Court proceeded without jurisdiction in compelling the lessor and the sheriff, under a rule to show cause, to deliver up possession of the goods in question to the assignees."

Other cases illustrative of the application of this rule under the law of 1867, are:

Knight v. *Cheney,* 5 N. B. R., 305; Fed. Cas., No. 7883,

a case involving the right of the bankruptcy court to order, in a summary way, a sale of property claimed by the assignee in bankruptcy, but in the actual pos-

session of a third person claiming it as owner. Mr. Justice Clifford said:

"Discretionary power, it must be conceded, exists in the district court to order a sale of the estate of the debtor, where it appears that the title is in dispute, if it also appears that the debtor was in possession of the estate at the time that he was adjudged bankrupt, and that the estate was duly transferred to the assignee and that it remained in his possession at the time the sale was ordered. * * *

Viewed in any light, the court is of the opinion that the district court does not possess the power under that provision to order in a summary way the sale of an estate, real or personal, although the same is claimed by the assignee, even though the title to the same is in dispute, if it also appears that the estate in question is in the actual possession of a third person, holding the same as owner and claiming absolute title to and dominion over the same as his own property, whether derived from the debtor before he was adjudged bankrupt or from some other former owner."

And upon a *petition for revision* the action of the District Court was reversed.

In re Marter, 12 N. B. R., 185; Fed. Cas., No. 9143,

where, upon a summary petition, a third person had been enjoined from disposing of the property of the bankrupt in his possession, and had violated the injunction, and a motion for an attachment for contempt was denied by Mr. Justice Brown upon the ground that the District Court was without power to determine the validity of the assignee's title by summary proceeding.

In re Ballou, 3 N. B. R., 717; Fed. Cas., No. 818,

where property, levied upon by execution, was by order

of the bankruptcy court delivered to its assignee, and was by him sold subject to its determination as to the validity of the lien claimed by the execution creditor, Mr. Justice Blatchford dismissed the petition, saying:

"The objection was taken, at the hearing, by the counsel for the firm, that, inasmuch as the proceeding instituted by the petition of the assignee is one against the firm as claiming an adverse interest touching property or rights of property of the bankrupt, transferable to or vested in the assignee, it is wholly irregular, because it was not brought upon a plenary bill in equity, but by a summary petition and an order to show cause. On the authority of the recent decision made in the circuit court for this district, in the case of *In re Bonesteel* [Case No. 1627] this objection must be held to be well taken. As the petition falls, the answer must fall with it, and also the prayer of the answer, that the assignee may be ordered to satisfy the execution out of the proceeds of the sale of the property levied upon."

In re Bonesteel, 3 N. B. R., 517; Fed. Cas., No. 1627.

There, upon a summary petition by an assignee in bankruptcy, against the wife of the bankrupt, the bankruptcy court had decided that certain stock held by the wife belonged to the bankrupt, and Mr. Justice Nelson, upon *petition for review,* set aside the decree as founded upon irregular proceedings.

See, also:

Barstow v. *Peckham,* 5 N. B. R., 72; Fed. Cas., No. 1064.

Rogers v. *Winsor,* 6 N. B. R., 246; Fed. Cas., 12,023.

Under these cases, the proceeding in the District

Court cannot be regarded as an independent suit—because, as such, that court was without jurisdiction of it—unless there is something in the present bankrupt act, which works a change in the law established by these cases.

But the present bankrupt act, instead of modifying, was adopted with reference to, and emphasizes, the principle of these cases. It imposes an express restriction upon the jurisdiction of the District Court over independent suits brought *by* the trustee in bankruptcy.

Section 2 of the present act confers jurisdiction upon the District Courts *as courts of bankruptcy,* among other things to "(7) cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, *except as herein otherwise provided.*" The italicized words, as this court has held in *Bardes* v. *Hawarden,* refer to section 23 of the act, that relating to the jurisdiction of the courts, which provides:

"(b). Suits by a trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

Thus this statute declares that the District Courts shall not have jurisdiction of an independent suit brought *by* the trustee, when the defendant does not consent, but that the exclusive jurisdiction thereof shall be in such courts as the bankrupt might have resorted to, if no bankruptcy proceedings had been instituted. Here, then, is an express statutory limitation on jurisdiction.

The fact that, after the court had overruled their objections to jurisdiction, these petitioners followed the case—as, without a sacrifice, they could not otherwise do—does not amount to a waiver of these objections. Upon this point,

Louisville Trust Co. v. *Comingor,* 184 U. S., 18,

is a direct authority. In that case, to a rule entered in the bankruptcy court, requiring an adverse claimant in possession of a fund to pay it to the trustee in bankruptcy, the claimant tendered a formal response denying jurisdiction, which the court refused to entertain, and he then participated in a hearing upon the merits. The bankruptcy court sustained its jurisdiction upon the ground that, by his "acquiescence in that mode of procedure," he had assented to its jurisdiction. Upon *petition for review* the Circuit Court of Appeals reversed the bankruptcy court, and this court upon *certiorari,* affirmed the Circuit Court of Appeals. The Chief Justice, after stating the nature of the claim, said (italics ours):

"This brought the controversy within the ruling in *Bardes* v. *Bank,* 178 U. S. 524, and the questions attempted to be litigated before the referee and in the District Court as to the allowance of the two amounts could only be raised in the District Court by consent, and then only by plenary suit. If the jurisdiction of the District Court was not consented to, then the state court, under the circumstances of this case, was the proper forum, and the matters in dispute were to be disposed of there. * * *

The proceeding was purely summary. * * *

The question is whether the District Court had juris-

diction to finally adjudicate the merits in this proceeding. * * *

In many cases jurisdiction may depend on the ascertainment of facts involving the merits, and in that sense the court exercises jurisdiction in disposing of the preliminary inquiry, although the result may be that it finds that it cannot go farther. *And where in a case like that before us, the court erroneously retains jurisdiction to adjudicate the merits, its action can be corrected on review.*

We are of opinion that even if Comingor could have consented to be pursued in this manner, he did not so consent. He was ruled to show cause, and the cause he showed defeated jurisdiction over the subject matter, that is jurisdiction to proceed summarily. He did not come in voluntarily, but in obedience to peremptory orders, and although he participated in the proceedings before the referee, he had pleaded his claims in the outset, and he made his formal protest to the exercise of jurisdiction before the final order was entered."

In re Baudouine, 101 Fed., 574; 41 C. C. A., 318.

It is a similar case. The District Court decided it had acquired jurisdiction, and the adverse claimant filed a *petition for review* in the Circuit Court of Appeals of the Second Circuit, which reversed the District Court.

These two cases are direct authority for the propositions, (1) that, by proceeding with the case, after their objections to jurisdiction were overruled, these petitioners did not waive their right to insist upon them in the appellate tribunals, and (2) that the proceeding in the District Court was a proceeding in bankruptcy, and was not an independent suit. Otherwise in *Louisville Trust Company* v. *Comingor, supra,*

both this court and the Circuit Court of Appeals were without jurisdiction, as was the Circuit Court of Appeals in *In re Baudouine, supra.*

Knight v. *Cheney* and *In re Bonesteel, supra,*—the law of 1867 not differing from the present act in this respect—were also reviewed by petition of review and not by appeal.

Hence, the proceeding in the District Court cannot be deemed an independent suit (from which an appeal would lie to the Circuit Court of Appeals under the Judiciary Act of 1891), because, by express statute the District Court had no jurisdiction of such a suit.

It does not, however, necessarily follow, that this proceeding is to be regarded as *coram non judice* in the District Court. It properly proceeded far enough to determine, whether it had jurisdiction, and, in doing so, it was acting within its jurisdiction of the bankruptcy proceeding.

Section 2 of the present bankrupt act makes the District Courts "courts of bankruptcy" and invests them with such jurisdiction as will enable them "to exercise original jurisdiction *in bankruptcy proceedings,* to * * * (7) cause the estates of bankrupts to be collected, *reduced to money,* and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

This section contains eighteen separate enumerations of powers, not necessary to be here set out. A reference to them will show that every one of them (except clause 4, which confers jurisdiction of crimes

against the bankrupt law) relates to the exercise of some power necessary to administer and distribute the bankrupt's estate. The exercise of each of these powers would give rise to some order in the bankruptcy case, considering all that takes place between the petition for adjudication and the last order in the case (as suggested by this court in *Lathrop* v. *Drake*, 91 U. S., 516) as one case. Clause 7 is, we conceive, no exception to this statement. The words "except as herein otherwise provided" are words of limitation upon the jurisdiction conferred by section 2 upon district courts *as courts of bankruptcy*, the jurisdiction which they have of independent suits being apparently conferred by other provisions of the statute.

By this clause (7) the law contemplates that the bankruptcy court, acting through a trustee, may proceed in the *collection* of the estate, until an adverse claimant in possession is reached, when it must stop, unless such claimant consents to have it decide the controversy.

So, too, the bankruptcy court is by this clause given jurisdiction of proceedings, wherein it is sought to have estates of bankrupts *reduced to money*, and it may determine certain controversies that may arise while so acting. Under this power it may proceed until a controversy is reached with an adverse claimant in possession, who objects to a hearing in the bankruptcy court, when it must stop. Where, therefore, in a proceeding to sell property, the court finds it to be in the possession of an adverse claimant, its jurisdiction to pro-

ceed is at an end by the express provision of the present statute.

This is in perfect harmony with the former bankrupt act, under which, as already shown, the bankruptcy court was without jurisdiction to order a sale of property (claimed by the trustee in bankruptcy) which was in the possession of an adverse claimant.

But from this it does not follow that the District Court was, in the case at bar, without jurisdiction *ab initio*. It necessarily must have jurisdiction to proceed up to the point of determining that there exists an adverse claim; that is, that the property is in the possession of an adverse claimant.

Louisville Trust Co. v. *Comingor*, 184 U. S., 18.
Mueller v. *Nugent*, 184 U. S., 1.
In re Baird, 116 Fed., 765.
In re Kane, 131 Fed., 386,

are authorities for this proposition.

The necessity for this is well illustrated by the case at bar. This proceeding started in the District Court by the receiver filing a petition which recited that the receiver "has taken possession of the property" in controversy. The petitioners at bar and the storage company filed pleadings denying this and claiming that the storage company had possession. Here, then, was a dispute as to possession. If the averments of the receiver's petition were true, the court had jurisdiction to sell. If the claim of the petitioners and the storage company should be sustained, the court was without jurisdiction to sell, because

without possession of the property to be sold. The District Court, acting as a court of bankruptcy and in the bankruptcy proceeding, had jurisdiction to determine, as it did, this controverted fact.

What, in this state of the case, if there had been in the meantime no sale, should the District Court have done? Clearly, ordered the property returned to the possession of the adverse claimants.

But, pending a hearing of this controversy, the District Court found it necessary to require the sale of the property and have the money held subject to its order. Does this change the situation? Clearly not. When it finally decided the possession to be in the adverse claimants, the only order it could properly have made was an order returning the money, as it did, to these adverse claimants.

Hence, the District Court, under its power, *as a court of bankruptcy,* acted properly in determining whether the property was in the possession of the receiver, that is, within its jurisdiction.

In this view, is it not clear that the proceeding was one in bankruptcy?

The Circuit Court of Appeals sustained the jurisdiction of the District Court upon the ground, that it had acquired a fund, and had jurisdiction, as any court would, to dispose of it. (Rec., 388.) But is the nature of a proceeding to be determined by the fact that the court has improperly seized property and turned it into money? If so, then a court of bankruptcy may create jurisdiction in itself where the statute expressly declares it shall have none. A court by its own improper

exercise of jurisdiction can give itself no jurisdiction whatever. If, under a misapprehension, or pending the ascertainment of a disputed fact upon which jurisdiction depends, the court seizes property and subsequently decides against its jurisdiction, the orderly administration of justice requires, that it return the property, or, if sold, the proceeds, to the party from whom it had improperly taken it.

Again, the nature of a proceeding should be determined by considering it as a whole, and not any part of it, nor any particular order in it.

But, even if jurisdiction existed in the District Court, because of its possession of this fund, to decide the merits of this disputed ownership, the case in that court was a proceeding in bankruptcy. This same Circuit Court of Appeals has expressly so decided in another similar case.

In re Antigo Screen Door Co., 123 Fed., 249; 59 C. C. A., 248.

Hence, under either view above stated, the case in the District Court was a proceeding in bankruptcy. Which of these views is the correct one is material here only in determining the extent, if any, to which the case was reviewable in the Circuit Court of Appeals.

II.

NO APPEAL LAY TO THE CIRCUIT COURT OF APPEALS.

The proceeding in the District Court being, then, "a proceeding in bankruptcy," the only jurisdiction which the Circuit Court of Appeals had thereof arose out of the following provisions of the bankrupt act of 1898:

Sec. 24 (*b*): "The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

Sec. 25 (*a*): "That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to wit,

(1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt;

(2) from a judgment granting or denying a discharge; and

(3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over."

The authorities agree that a judgment in a proceeding by or against a lien holder, which merely establishes or rejects the lien, and does not decide whether a claim is a provable debt in bankruptcy, is not a judgment allowing or rejecting the debt or claim within Sec. 25 (3) above.

In re Rouse, Hazard Company, 33 C. C. A., 356; 91 Fed., 96 (7th Cir.).

In re Worcester County, 42 C. C. A., 637; 102 Fed., 808 (1st Cir.).

In re Abraham, 35 C. C. A., 592; 93 Fed., 767 (5th Cir.).

In re Whitener, 44 C. C. A., 434; 105 Fed., 180 (5th Cir.).

Hutchinson v. *Otis,* 190 U. S., 552.

It follows, then, that no *appeal* lay from the District Court to the Circuit Court of Appeals.

III.

THE APPEAL COULD NOT PROPERLY BE TREATED AS A PETITION FOR REVISION.

Sec. 24b, *supra*, in conferring on the Circuit Courts of Appeals the right to "superintend and revise" bankruptcy proceedings, says: "Such power shall be exercised on due notice and *petition* by any party aggrieved."

In this respect it is more stringent that the bankrupt act of 1867, which provided that Circuit Courts should "have a general superintendence and jurisdiction of all cases and questions arising in the district court of such district when sitting as a court of bankruptcy, * * * and * * * may, upon bill, petition, or *other proper process*, of any party aggrieved, hear and determine the case as in a court of equity."

Stickney v. *Wilt*, 23 Wall., 150,

—a petition for revision in the Circuit Court, where there should have been an appeal from the District Court,—this court held, under the foregoing statute, that "the Circuit Court has no jurisdiction of the subject-matter in that form of proceeding." In other words, this court declined to allow a petition for revision to be treated as an appeal, and reversed the Circuit Court with directions to dismiss such petition.

Cleveland Ins. Co. v. *Globe Ins. Co.*, 98 U. S., 366.

There, this court held, under the act of 1867, that the Circuit Court was justified in treating a writ of

error as adequate "other process" under the above provision. In

Milner v. *Meek*, 95 U. S., 252,

this court held that, under the act of 1867, the Circuit Court might treat an appeal as a petition for revision, where the parties in the Circuit Court had expressly waived any irregularity by reason of the case being there by appeal instead of petition for revision.

It was doubtless because of this indefiniteness in practice under the act of 1867, that Congress, in passing the present act, provided that the jurisdiction of the Circuit Courts of Appeals to superintend and revise bankruptcy proceedings "shall be exercised on due notice and *petition* by any partly aggrieved."

This plainly contemplates the filing of a petition in the *Circuit Court of Appeals*, and a notice thereof to the adverse party. It is somewhat far-fetched to say this is met by a petition for appeal, which requires no notice and is filed, and remains, in the *District Court*.

It is for this reason that some Circuit Courts of Appeals have held that an appeal cannot be treated as a petition for revision.

In re Whitener, 44 C. C. A., 434; 105 Fed., 180.

In re Worcester County, 42 C. C. A., 637; 102 Fed., 808.

In the latter case the court, after referring to the different offices of appeal and petition for revision, said:

"It is plain that congress insisted on a distinction of a substantial nature, which we are not at liberty to disregard."

In this view the Circuit Court of Appeals should, when this point of jurisdiction was raised, have dismissed the appeal. Indeed, it should have done so, had counsel not raised the question.

M. C. & L. M. Ry. Co. v. *Swan*, 111 U. S., 379.

Hence, that court acted without jurisdiction, and *certiorari* is proper to correct this.

American Sugar Ref. Co. v. *New Orleans*, 181 U. S., 277.

Kingman v. *Western Manufacturing Co.*, 170 U. S., 675.

IV.

IF THE APPEAL WERE PROPERLY TREATED AS A PETITION FOR REVISION, THE CIRCUIT COURT OF APPEALS ERRED IN NOT CONFINING ITS ACTION TO REVISION IN MATTER OF LAW.

Some of the Circuit Courts of Appeals hold that an appeal, when none lies, may be treated as a petition for revision.

Chesapeake Shoe Co. v. *Seldner*, 122 Fed., 593. 58 C. C. A., 261.

If the Circuit Court of Appeals was justified in doing this—and thus only can its jurisdiction be sustained—still it should not have disregarded, as it did, the plain provisions of the bankruptcy act confining its jurisdiction in revision to "matter of law." Indeed, that court in a decision (*In re Antigo Screen Door Co.*, 123 Fed., 253, 59 C. C. A., 248) rendered the same day as its opinion in the case at bar, so held, saying:

"We are not at liberty upon a petition for review

to challenge the facts, or an inference of fact, found by the court below. We may only consider and rule upon a question of law."

Still that court in this case undertook to decide a question of fact, that is, whether the storage company had acquired possession, and reversed the District Court, because on this point it disagreed with that court. In this the Court of Appeals clearly erred, and this should result in reversal, unless in the record there is some question of law, which justifies the reversal of the District Court.

A petition for revision manifestly should disclose the concrete questions of law upon which revision is sought.

If, therefore, this appeal be treated as such petition, it only raises such questions of law as are therein distinctly pointed out by the assignments of error.

In this view, what are the questions of law that arise on this record?

Under the view urged in the first point of this brief, the District Court, in ordering the money returned to these petitioners, should perhaps have done so without prejudice to the right of respondents to litigate with petitioners in the state court. But the record in the Circuit Court of Appeals raised no such question. There is no assignment of error at all upon the *form* of the order or decree. Nor did respondents raise, or rely upon, this question in the Court of Appeals. It would seem, therefore, that this question is not a question for the decision of this court.

One question of law arising upon this record is, whether a bankruptcy court may, through its receiver,

seize and sell property in the possession of an adverse claimant. This has been already discussed.

If the District Court might, because it had the possession of the fund, lawfully decide the merits of this case, then the following *questions of law* also arise upon the referee's report, and are properly reviewable upon a petition for revision:

1. Whether, upon the facts shown in the report of the referee, the receipts issued by the Storage Company are to be deemed valid warehouse receipts, so that their endorsement by Rodgers to these petitioners, as security for loans, constituted valid pledges of the seed.

2. Whether, if the receipts are not to be deemed valid *as warehouse receipts,* the transactions are, upon the facts shown by such report, to be regarded as constituting valid pledges to these petitioners of such seed.

3. If there was no pledge, whether these petitioners under the facts above set forth, severally acquired equitable liens upon such seed that are superior to the title of the trustee in bankruptcy.

These are practically the same questions that are certified by this same Circuit Court of Appeals to this court, in case No. 424 upon the present docket of this court.

V.

THE RECEIPTS IN QUESTION ARE VALID WAREHOUSE RECEIPTS AND THEIR ENDORSEMENT CONSTITUTED VALID PLEDGES.

The referee's report recites that "the National Storage Company had no warehouses of its own, its business was carried on by taking a lease of a part or all of the premises occupied by a customer, fixing its name on said premises, or posting notices thereon, and issuing receipts on property stored therein by its customers." (Rec., p. 30.) It further recites that Rodgers, the bankrupt, on August 31, 1900, executed a lease to the National Storage Company of a portion of his warehouse in Chicago, at a nominal rent. He continued to use, in the conduct of his business, the balance of the premises. "Upon the execution of the lease the National Storage Company proceeded to take possession of the premises leased by it from the bankrupt by tacking on the walls of the several floors notices * * * about three by seven inches in size, * * * said signs being eight (8) in number, and distributed on the several floors and containing the following: 'This property controlled by the National Storage Company as public warehouse. Warehouse premises No. 281.' Said signs were placed some seven or eight feet from the floor on the side of the building and on partitions between the premises in question and the premises of the electric company [another tenant of the same building]. No signs were placed on the outside of the building." (Rec., 31.)

Simultaneously Rodgers applied to the storage company for the issuance of its storage warrants upon ten separate lots of seed in the leased premises. The inspector of the storage company, after verifying by count the quantity, placed on each lot a card about four by six inches in size. Upon this card was printed in letters about one-quarter of an inch in height, the words, "Warehouse Card, National Storage Company, * * * No Disturbance Permitted While This Card Is Posted." (Rec., p. 32.) "The sections where the several lots of timothy seed were stored were marked by wooden signs about eighteen inches to two feet square, painted upon or fastened upon beams of posts immediately over the front of each section." (Rec., p. 32.) Upon the second floor there were no wooden signs indicating the sections, but the lots there located were segregated, and these tags were attached thereto. "The dividing line between the sections was an imaginary line, indicated neither on the floor nor on the wall." (Rec., 33.)

Thereupon the storage warrants in question were issued in the form already set out.

"When it was desired to have the seed on which these receipts had been issued removed from the warehouse, application was made on a printed blank of the storage company, and it issued its release of the same on the surrender of the receipt, and the receipt was cancelled, the release delivered to the bankrupt, and the property shipped by the bankrupt from the warehouse. However, in some instances the bankrupt shipped out the property before the receipts were cancelled, although there is no evidence that the storage company knew it." (Rec., 34.)

"The floors were large open floors, about sixty by one hundred feet in size, and have no partitions except that the west end of the second floor was partitioned off and used as an office by the bankrupt. The entrance to the premises was by a door from Johnson street in the west end of the building, the keys to which were kept and controlled by Rodgers and his employes. * * *

After the lease was made and the first receipts were issued the storage company sent its inspector (so-called) to examine the property covered by the receipts, and to see that the same was in order and that the cards were in place, etc. He testified that he visited the premises of the bankrupt on an average of from fifteen to eighteen times a month. * * *

The bankrupt continued to do his ordinary business in the premises after his lease to the storage company, maintaing an office with sundry clerks and workmen about the premises. He bought and shipped seed, cleaned the same, and he testified that he occasionally cleaned seed on which receipts were issued, and which were thus in storage, by taking it out of the bags, cleaning it and restoring and adding a sufficient amount of other seed to equalize the loss in cleaning." (Rec., 36.)

In some instances the bankrupt, without the knowledge of the storage company, took from the storage premises seed and substituted other of like quantity in its place.

The referee further reports (Rec., 39) that he "did not see anything in the scheme of the business of the company that was contrary to law if it is properly carried out."

"The motives of the parties in making this arrangement are not claimed to have been fraudulent, nor is there anything to justify any such supposition. The bankrupt desired to borrow money on, or to sell his merchandise. * * * To have taken the seed to some

public warehouse and there stored it, and then issued receipts, would have been expensive. * * * It seems to me clear that the bankrupt had no authority to interfere in any manner with the goods stored." (Rec., 41.)

The referee then finds that the steps taken were "sufficient notice to any and all persons who might have occasion to know by going to the building and going inside, that the bags were in the possession of the storage company, and that the floor, or part of the floor on which the bags were stored, was consequently the floor of the storage company. * * * In other words, it seems to me the question is, would an attaching creditor or a purchaser, going in there and attempting to levy on or buy the property in question, as the property of the bankrupt, be notified by the signs and tags thereon that it was not the property of the bankrupt, but the property of the National Storage Company. I think that such a purchaser or attaching creditor would so find out that the property was not the property of the bankrupt, but the property of some one else. * * *

The conduct of all the parties was in good faith, without intent to cheat or defraud anyone. * * *

The segregation of the property, and disposition by tags, notices, etc., was sufficient notice to the world." (Rec., 42.)

The report then finds that the seed, and the premises on which it stood, were continually in the possession of the storage company from the 31st of August, until after the adjudication of bankruptcy. The report also finds that the receipts were sufficient warehouse receipts under the law of Illinois, and that their endorsement to the petitioners constituted valid transfers of the property they represented.

The general method of warehousing here disclosed is not confined to this case nor to this company. It is an extensive business of another like company, the

validity of whose receipts are involved in case No. 424 upon the present docket of this court.

Indeed, it is a matter of such general knowledge, that this court may well take judicial notice, that sundry like companies are engaged in the same kind of warehousing, and that warehouse receipts issued in the manner disclosed by this record have extensively become instruments of commerce, and are the basis of transactions upon at least one commercial exchange in this country.

It may be aptly styled a new system of warehousing. Its origin is to be found in the requirements of modern commerce. It results from the commendable aim of business men to minimize the cost of production and distribution, which has given rise to the commercial exchange, the clearing house of the banks and many other like trade-facilities of recent date.

The principle of evolution finds exemplification in the business of warehousing. Take, for illustration, the warehousing of grain. The original theory of warehousing required the return to the depositor of the identical grain deposited, either as grain or flour. But it soon became impracticable to keep each person's grain by itself. Only the equivalent in quantity of his grain could well be returned to the depositor. At first the law declared that, where grain stored in a warehouse was not kept separate from that of others, the relation between the depositor and the warehouseman was only that of debtor and creditor.

This was attended with too many inconveniences to withstand the demands of commerce. As the trade in grain grew, the law was compelled to recognize "bulk"

warehousing in grain, and permit the grain of different depositors to be mixed together without destroying the title of each to his undivided part of the mass. While this change in the law was accomplished in Illinois and some states through legislation, in Iowa (*Sexton* v. *Graham*, 53 Iowa, 181) and many other states it resulted without statute, and because the courts felt under the necessity of conforming the law to the requirements of modern commerce.

Another change in the business of warehousing is presented by the method disclosed in this case. Commerce has found that many articles of trade can not, because of the expense of removal, be carried to a central or general warehouse for storage, but must be warehoused, if at all, at or near the point of production or distribution. Especially in the South, where the amount of capital available for business is limited, has it been found helpful to manufacturers to resort to this method of warehousing. Thereby pig iron and other raw and manufactured products are, for commercial purposes, turned into storage warrants, by the use of which available capital is more readily secured, and thus manufactories are operated more continuously, and labor is more steadily employed.

Again, many towns where factories are located are too small to sustain a general warehouse. The removal of many articles of manufacture from such a town to a general warehouse in a larger place would be so expensive, relative to the value of the goods and the profits of manufacture, as to preclude their being warehoused at all in that way.

Such are the business necessities that have given rise to this new system of warehousing. To withhold from it legal sanction is to place at a disadvantage many manufacturers and distributors, who seek to utilize their property to increase their working capital, as others, differently circumstanced, do. So, the question here is—as it was in the case of bulk warehousing of grain—whether the law will obstruct, or conform to, the requirements of modern commerce.

This new system asks of the courts no *new* law. It only seeks to have applied to its transactions the same law, that has for many years been applied to other analogous cases.

Doubtless it is competent for a state, within constitutional limits, to regulate warehousing within its borders, and declare what shall constitute a warehouse and what a warehouse receipt. The State of Illinois, however, has not, as respects this kind of warehousing, seen fit to adopt any statute imposing any restrictions.

Article XIII, Sec. 1 of the Illinois Constitution of 1870 provides:

"All elevators or store houses where grain or other property is stored for compensation, whether the property stored be kept separate or not, are declared to be public warehouses."

Other sections of the same article deal with the warehousing of grain and impose upon the legislature the duty of passing laws for the inspection of grain and for the protection of producers and shippers of grain.

In compliance with this mandate the legislature

passed a statute, the 1st, 2nd and 24th clauses of which are as follows (R. S., Ill., Chapter 114):

Sec. 1. "Public warehouses, as defined in article 13 of the constitution of this state, shall be divided into three classes, to be designated as classes A, B and C, respectively."

Sec. 2. "Public warehouses of class A shall embrace all warehouses, elevators and granaries in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved, such warehouses, elevators or granaries being located in cities having not less than 100,000 inhabitants. Public warehouses of class B shall embrace all other warehouses, elevators or granaries in which grain is stored in bulk, and in which the grain of different owners is mixed together. Public warehouses of class C shall embrace all other warehouses or places where property of any kind is stored for a consideration."

Sec. 24. "Warehouse receipts for property stored in any class of public warehouses, as herein described, shall be transferable by the indorsement of the party to whose order such receipt may be issued, and such indorsement shall be deemed a valid transfer of the property represented by such receipt, and may be made either in blank or to the order of another. All warehouse receipts for property stored in public warehouses of class C shall distinctly state on their face the brand or distinguishing marks upon such property."

Most of the other sections of the act formulate an elaborate system of storing grain in bulk, and require it to be inspected as it goes in and out of warehouses. The remaining sections aim to secure honest warehousing. None are pertinent to the questions arising here.

Section 24, above quoted, is, as respects the trans-

ferability of the receipt, but declaratory of the common law, as will be manifest from the authorities hereinafter cited.

The leased premises in the case at bar fall within this constitutional definitition of a public warehouse; for this was a place where property was stored for compensation. (Here see *Union Trust Co.* v. *Trumbull,* 137 Ill., 146, hereinafter referred to.)

In any event, there is in these provisions no state prohibition of, nor restriction upon, this method of warehousing.

As these receipts were issued, and cover property, in Illinois, any authoritative decision of its courts would doubtless control. (*Hervey* v. *Rhode Island Works,* 93 U. S., 664.) But there is no such decision.

If, therefore, the leased premises are to be adjudged not a warehouse, and these receipts not warehouse receipts, it must be because of some inhibition in the common or general law. Is there, then, any such prohibition?

By the law of Illinois, as by the law generally, the transfer of personal property, either absolutely or by way of security, must, as against subsequent purchasers, lien holders, and levying creditors, be accompanied by a change of possession, except in the case of a chattel mortgage where by statute recording is made an alternative. In this respect there is no distinction between a sale or pledge without, and one made through, the intervention of a bailee (warehouseman).

Because of this rule of law, it is essential to the legality of every kind of warehousing, and of all re-

ceipts, that the warehouseman should have the possession and control of the property covered by his receipts.

The only substantial difference between this kind of warehousing and ordinary warehousing is, that in the former the warehouseman, instead of having one building, in which is stored the goods of all his depositors, may have numerous rooms or premises in a single city or town, and these are so located that, as a rule, only one depositor resorts to each of them. But there is no legal reason for requiring a warehouseman to have all his rooms under one roof, nor all the property stored by him in one building. Would not all his rooms, although located at different places, be deemed in contemplation of law, as his warehouse? Other legal requirements being met, of what legal consequence is it that his warehousing space is thus divided?

The only objection urged against this system of warehousing is the argument of false credit or secret lien; but this applies here with no greater force than in the case of a sale, or direct pledge, or unrecorded chattel mortgage. In such cases an open and visible change of possession is deemed sufficient. Why is this not so also in this case of warehousing?

In considering the question, what constitutes a change of posession, this distinction should be noted. As between a vendor and vendee, anything indicating the intention of the parties that the former should release the control of the property and the latter assume it, is sufficient to pass title, make the purchase price due, or locate the loss in case of destruction by fire. But, as between the vendee, and

levying creditors, subsequent encumbrancers and purchasers of the vendor, the law not only requires a change of possession, but that it be open and visible.

What constitutes such a change of possession, as against the parties last named, is also sufficient in law as between a pledgee or chattel mortgagee, and subsequent purchasers, or levying creditors, of his pledgor or mortgagor.

So, the reason being the same, the extent to which a change of possession is required, must be the same between a warehouseman and his receipt holders on the one side, and purchasers from, or levying creditors of, the bailor on the other side.

Hence, authorities holding the change of possession sufficient in the case of a sale, pledge or chattel mortgage are equally in point in the case at bar.

The real question then is, whether the placing of property upon premises leased to a vendee or pledgee or warehouseman, accompanied by a continuous display of signs plainly indicating the vendee's, pledgee's or warehouseman's interest, constitutes a sufficient change of possession to make the transaction unassailable. It is believed that the following cases amply warrant an affirmative answer to this question.

Hatch v. *Oil Company,* 100 U. S., 124:

In that case a firm agreed to manufacture and sell staves to the Oil Company, and leased to that company a tract of land adjoining the firm's mill, upon which the staves were piled as manufactured and counted by an agent of the Oil Company. Before anything else had been done in the way of changing pos-

session, creditors of the manufacturers levied execution on the staves and contended that, as against them, there had been "no actual or continued change of possession" within the meaning of the statute of Michigan, where the property was located. But the court awarded the staves to the Oil Company, saying:

"Actual delivery of the staves having been proved, it is not necessary to make any reply to the defense set up under the State statute in respect to the sale of goods unaccompanied by a change of possession."

Sumner v. *Hamlet*, 12 Pick., 76:

In that case a manufacturer of flannel obtained a loan from defendant upon the security of forty-five pieces of cloth, and it was arranged that these pieces should be placed in charge of one Guild, foreman of the factory. This foreman selected forty-five pieces of cloth, and they were set apart and marked with the defendant's initials, but were not removed from the factory. Being subsequently levied upon by a creditor of the manufacturer, Chief Justice Shaw upheld the pledge, saying (p. 82):

"We are also of opinion, that the *lien* thus created was maintained by the possession of Guild. Whatever was the nature of his general relation to the proprietors of the manufactory, in this particular transaction he was constituted the special agent of the defendant, for the purpose of keeping possession for him, although in other respects the servant of Stanley & Co. • • • To constitute such special possession, it was not necessary that the goods should be removed from the premises of the former owners; it was sufficient that they were so far in the custody of the special bailee, that he could at all times have the legal control of them, and give notice of the lien to any purchaser

and attaching creditor, and remove the goods if such removal should be necessary for the safety of the principal."

First National Bank v. *Pennsylvania Trust Company,* 124 Fed., 968; 60 C. C. A., 100:

There a steel company borrowed money from a bank, and executed to it a bill of sale of certain billets, which were permitted to remain on the premises of the company. The billets were marked by a sign posted on the several piles, reciting that they were the property of the bank. The steel company was then adjudged a bankrupt, and its trustee resisted the claim of the bank to a lien upon the billets; but the Circuit Court of Appeals of the Third Circuit upheld the lien saying (p. 969):

"It cannot be disputed that on the 30th day of August, 1901, when the bank discounted the note of the steel company, and took the bill of sale of the billets, it acquired a good and valid title thereto as between itself and the steel company. To complete its title or lien as against creditors and strangers, the bank was not obliged to take the billets into actual possession; it was sufficient to give notice of their lien or change of ownership. This they did by posting on the billets, which were in distinct and separate piles, the sign to which reference has been made, so that on August 30, 1901, the title of the bank or its right to a lien on the billets was good as against all of the world."

Bank of Rome v. *Haselton,* 83 Tenn., 216:

In that case material belonging to an iron company was stored in a warehouse forming a part of its plant, which was leased to one Lowe, but for which he paid no rent. Other material consisting of pig iron, etc., was stored outside of this warehouse in yards around the

iron company's works. Thereupon Lowe issued to the iron company warehouse receipts for the property thus stored, and the latter delivered them to various parties to secure loans. Subsequently attaching creditors levied upon the property, and insisted that the receipts were invalid, because the possession of the property had never been in Lowe, but remained with the iron company. But the lien of Lowe was upheld, the court saying (p. 247):

"In short, the actual possession was in Lowe; the property was in the warehouse or on the yard when the receipts were given, and they are not invalid for the want of possession by the warehouseman and consequent authority to issue them."

Sharp, Assignee, v. *Philadelphia Warehouse Co.,* 9 Reporter, 572:

There a dealer in goat skins leased the cellar of his store to the Warehousing Company at a nominal rent, and merchandise of such dealer was placed in this cellar, and on the security thereof loans were made by the company to this dealer, who subsequently was adjudged a bankrupt, and a bill was filed by his assignee in the federal circuit court at Philadelphia, seeking to adjudge the pledge fraudulent and void, as against creditors of the bankrupt, upon the ground that there had been "no change of possession, although the goods were capable of actual delivery," but the court upheld the pledge, saying:

"As respects the goods placed in the cellar, we see no room for controversy. Leasing the cellar and removing the goods thereto, constituted a sufficient delivery to satisfy the requirements of law."

Kentucky Furnace Co. v. *City Bank,* 25 Ky. Law Rep., 28:

That case affirms the validity of warehouse receipts issued under circumstances similar to those at bar, the Court of Appeals saying:

"The Kentucky Furnace Co. leased to J. P. Holt a part of its ground and then placed upon the ground so leased its pig iron, and Holt issued to it warehouse receipts therefor. These warehouse receipts it pledged to appellee for money loaned. The pig iron was stacked on the ground and was marked by Holt with chalk marks 'C. N. B.', after the pledge of the certificates, to show that it belong to appellee, the City National Bank. * * * The arrangement was in perfect good faith; the property on which the bank held a lien was separated and marked, and the lien of the bank was recognized by the furnace company. After all this, on August 6, 1900, the furnace company became bankrupt, and appellant was elected trustee of the bankrupt estate. * * * Appellant, after this, brought the suit before us, alleging that he had demanded the possession of the property from the bank that he might administer upon it as part of the bankrupt estate, and praying judgment against it for the property. * * *

This was a valid pledge, and the circuit court properly enforced it."

Fidelity Co. v. *Roanoke Iron Co.*, 81 Fed., 439:

In that case an iron company borrowed money from a warehouse company upon the security of certain iron, and the court said:

"The warehouse company therefore leased parcels of land from the iron company next to the cast house of the iron company, and on this the iron was stored; the warehouse company having an agent specially designated in charge of their iron, and signs being put up on the premises on which appeared 'Storage Yard Philadelphia Warehouse Company.' * * *

The first question is, was this arrangement between the iron company and the warehouse company a valid

pledge? * * * The question must be answered in the affirmative."

American Warrant Co. v. *German,* 126 Ala., 194.

There the court in sustaining the validity of a pledge against the claim of a subsequent pledgee of the same pledgor, said (p. 239):

"In this case it is clearly proven that under the agreement of pledge between the furnace company acting by its president and Verchot, a particular spot of ground belonging to that company and located apart from its own iron yards was tendered by the president and accepted by Verchot for his use and that a quantity of iron was placed thereon, piled in 100 ton lots and marked with paint with Verchot's initials."

Dunn v. *Train,* 125 Fed., 221; 60 C. C. A., 113: There the plaintiff loaned money to a paper company and took as security certain paper, which remained at the mill of the paper company in the custody of an agent appointed for that purpose. The Circuit Court of Appeals of the First Circuit upheld the pledge, saying (italics ours):

"This case must therefore turn upon the question of delivery and acceptance, or, in other words, upon change of possession. * * *

It being a question of intention, and a question whether the change in the situation of the property was such as to be *notice of a change of possession,* it was, under the circumstances, largely a question of fact, to be determined under the rules of law. * * *

It was further found as fact that from the said 31st day of August the paper company for a time delivered to Mr. Kline, under this arrangement, all the finished product of the mill, the place of such deposit being accessible from other portions of the mill; that paper thus deposited remained where it was de-

posited in the mill, apart by itself, not confused with any other paper, until December 30, 1895, at which time the paper company had constructed a new storehouse, and thereupon the paper which had been already delivered and deposited in the basement and shipping room of the mill, as above stated, was transferred to the new storehouse, and remained under the care of Gedney, who had been appointed the agent of Train, Smith & Co. [the creditors], where it remained apart from all other paper until replevied. * * *

Nor is there any absolute rule of law which requires property pledged to be removed from the premises of the pledgor. *It is enough if the facts sufficiently show that the goods are actually set apart in the keeping of the special bailee, with authority to notify third persons that they are held in pledge,* and to remove the goods, if found necessary for the safety of his principal."

Allen v. *Hollander,* 128 Fed., 159.

There the debtor, a dealer in carriages, undertook to transfer certain carriages to a creditor to be sold by him, the proceeds to be applied on the indebtedness. The carriages were delivered to an agent of the creditor, who removed them *into a separate room in the debtor's warehouse,* where they were tagged with the creditor's name and there left to be sold by his agent, and the pledge was upheld.

Other like cases might be cited, but the foregoing are thought sufficient to show that, under the rule in transfers of property, the change of possession in the case at bar was a sufficiently open and visible one. All that the authorities require is such change as shall give notice to third parties. In view of the referee's finding it can hardly be contended that the steps taken were not ample to notify anyone seeing

the property that it was in the possession of the Storage Company.

Were, then, the receipts of such a character that their endorsement and delivery were tantamount to the delivery of the property itself?

It was clearly the purpose of that company to assume, and of Rodgers to have it assume, the position and responsibility of a warehouseman. When Rodgers borrowed the money from petitioners, it was the clear intention of all these parties, that the receipts should be regarded as symbols of the property and their delivery should constitute valid pledges. Should not the law so hold?

This question finds an affirmative answer in the following cases:

Gibson v. *Stevens*, 8 How., 383.

There a firm bought 350 barrels of pork and 200 barrels of flour, which then were in warehouses of the two sellers, and there remained until seized as hereinafter stated. This firm then borrowed money from Gibson, and delivered to him as security, after endorsing upon the back of each an order for delivery to him or his order, certain documents issued by these sellers and reciting that they held the property subject to the buyer's orders. The sellers do not appear to have been warehousemen. Subsequently creditors of the firm levied on the property in controversy, and contended that the delivery of the documents did not constitute a pledge, because (1) the documents did "not amount to warehouse receipts"; and (2) there being no statute in New York nor Indiana making their

transfer tantamount to the delivery of property, they could not be accorded that effect. But this court, through the Chief Justice, upheld the pledge, saying:

"The transaction, therefore, being in the usual course of trade, and free from all suspicion of bad faith on the part of the plaintiff [Gibson], the question to be decided is, what was the legal effect of the indorsement and delivery of the warehouse documents, in consideration of the advance of money he then made to McQueen & McKay? In the opinion of the court, it transferred to him the legal title and constructive possession of the property; and the warehousemen from the time of this transfer became his bailees, and held the pork and flour for him. The delivery of the evidences of title and the orders indorsed upon them was equivalent, in the then situation of the property, to the delivery of the property itself.

This mode of transfer and delivery has been sanctioned in analogous cases by the courts of justice in England and this country, and is absolutely necessary for the purposes of commerce. * * *

The indorsement of the delivery order upon these evidences of his title, like the indorsement upon a bill of lading, sufficiently manifests the intention of the parties that the title and possession should pass to Gibson. And when that intention is evident from the language of the written instruments and the nature and character of the contract, it is the duty of the court to carry it into execution without embarrassing it with needless formalities. * * *

Nor, as respects the legal title, can there be any distinction between the advance made by Gibson, and the case of an actual purchaser. To the extent of his advances he is a purchaser, and the legal title was conveyed to him to protect his advances."

In a note to *Lickbarrow* v. *Mason,* Smith's Leading Cas., 7th Am. Ed., Vol. 1, Part 2, p. 1197, it is said:

"The exigencies of trade have called a class of instruments into being, which are substantially ac-

knowledgments by public or *private* agents that they have received merchandise, and from whom or on whose account, and usage has made the possession of such documents equivalent to the possession of the property itself. Thus warrants or receipts are habitually issued for the merchandise deposited in the various warehouses in England; and * * * a sale attended by the transfer of such an instrument, is as effectual as if the property were handed over to the purchaser."

Northrop v. *First National Bank*, 27 Ill. App., 527.

There a receipt issued by one, not a warehouseman, and providing that the property was "deliverable only on surrender of this receipt," was pledged for a loan, and the pledgee recovered in an action of replevin, the Appellate Court saying (italics ours):

"The *quasi* negotiable character of warehouse receipts was judicially recognized long before the act of the legislature of this state for the regulation of public warehouses was passed. Prior to that time the principle applied by the courts was, that the delivery of warehouse receipts is a symbolic delivery of the property itself, and that it has the same effect as the delivery of the property and can have no greater, and that a transfer of the warehouse receipt, by the person in possession of it, gives no higher title than would the transfer of the property by the same person. * * *

That such is the rule adopted in this State, and that warehouse receipts issued by *private agents or by warehousemen, other than those described as public warehousemen,* are placed on the same footing as bills of lading, in respect to their *quasi* negotiable character, we have no reason to doubt."

In a subsequent case, decided in 1897,

Montgomery Ward & Co. v. *Am. Trust & Sav. Bank*, 71 Ill. App., 20,

the same court decided the same way.

These decisions, while not authoritative, are entitled to consideration as showing what the lower courts in Illinois regard as its law on the subject under consideration.

Millhiser Mfg. Co. v. *Gallego Mills Co.*, 101 Va., 579.

There a corporation, engaged in milling flour, also maintained a warehouse, and issued certain warehouse receipts upon grain in its warehouse, without causing itself to be licensed pursuant to a statute of Virginia providing for the licensing of warehouses, and (in language not unlike Sec. 24 of the Illinois Warehouse Act above quoted) that warehouse receipts issued by persons keeping a *licensed* warehouse should be transferable by endorsement, and the assignee of such receipt should be deemed the owner of the property, so far as to give effect to a sale or pledge to him. In a contest for priority between the holders of these receipts and other lien holders the court said:

"A place adapted to the reception and storage of goods and merchandise is a warehouse at common law. Bouvier's L. D. 1211. * * *

Having considered the nature and effect of the warehouse receipts and elevator certificates involved in this case and reached the conclusion that they, like a bill of lading, at common law, represent the goods therein, and that the transfer of the ownership as well as the right of possession is made as effectually by their transfer and delivery as it can be by a physical delivery of the goods, we are brought directly to the question whether or not Chapter 82 of the Code abrogates the common law with respect to such receipts or certificates and invalidates them and all of like character where not issued by a licensed warehouse whose owner or proprietor has complied with the statute. * * *

We regard the statute, Chap. 82 of the Code, *supra*, as merely declaratory of the common law as applied to *licensed* warehouses under that statute, adding that such provisions as were deemed essential for the better protection of the holders of such receipts, not a sentence or a word even of negation of the common law being contained in the statute."

See, also,

Rice v. *Cutler*, 17 Wis., 362.

Under the authority of these cases the endorsement and delivery of the warehouse receipts in question constituted pledges, even if the National Storage Company should not be deemed a *public* warehouseman under the Illinois statute.

But *Union Trust Company* v. *Trumbull*, 137 Ill., 146, (decided in 1891 and hereafter more fully set out), supports the position that this storage company was a public warehouseman under that statute. In that case the endorsement of receipts, issued by this same storage company, was held not to create a legal pledge, but this was expressly put upon the grounds (1) that the storage company had not taken or maintained adequate possession, and (2) that it had not complied with the Illinois warehouse act (which relates only to public warehouses), in that it had not separated and marked the wool covered by each receipt so that it could be identified by its receipt. The necessary inference is that, but for these two defects, the receipts, when endorsed as security, would have been valid pledges; in other words, that the storage company was within that statute—that is, a public warehouseman.

Without referring further to the numerous cases, they easily justify the proposition, that receipts issued

by one engaged in the business of storing, for a compensation, goods not his own—whether a statutory (public), or only a private, warehouseman,—are such documents that their endorsement and delivery are tantamount to delivery of the property itself, and create legal pledges.

Hence, these warrants were valid warehouse receipts and their endorsement to petitioners constituted valid pledges.

VI.

IF THESE DOCUMENTS WERE NOT WAREHOUSE RECEIPTS, STILL THE TRANSACTIONS CONSTITUTED VALID PLEDGES BY RODGERS TO PETITIONERS.

If Rodgers had proposed directly to petitioners that, to secure their loans, he would lease to them this space, and put therein this property, and place on the premises and property signs amply indicating that they were in their possession, and this proposition had been accepted, and this situation maintained, until his bankruptcy, there would, it is believed, be no question that the transaction would constitute pledges valid against the world.

The same conclusion would inevitably follow, if, instead of doing this, the parties had selected a special custodian, upon whom should be cast the responsibility of maintaining the custody and possession of the property. A transaction is none the less a pledge because, instead of the pledgee taking possession himself, a custodian does so for him. A transaction is none the less a pledge because the person, who acts as such

custodian, *makes a business* of doing so. A subsequent ratification being equivalent to a previous authority, the acceptance by petitioners of the receipts of the storage company, when tendered upon the loans, was equivalent to the petitioners' ratification of Rodgers' selection of the storage company as their custodian.

In the receipts it is expressly provided that "this company shall, in the custody of the above property, be the agent of the holder of this warrant." (Rec., 136.)

Hence, the transactions were valid as pledges, even if the receipts be not regarded as strictly warehouse receipts. This view was adopted in

Proctor v. *Shotwell,* 79 S. W. Rep., 728,

where the validity of receipts issued under conditions similar to those at bar by a company doing a similar business, was upheld, the court saying:

"Much has been said by plaintiff to show that the receipt held by interpleader was not what is technically known as a 'warehouse receipt,' and that its transfer to interpleader did not, and could not, transfer possession of the property. It can make no difference in the result which must be reached in this case whether the institution styled 'Merchants & Manufacturers' Warehousing Company of New York' was what would properly be designated a 'warehouseman.' It was in the possession of the grain, and was at least a bailee."

Kentucky Furnace Co. v. *City Bank,* 25 Ky. Law Rep., 28,

(already cited) where the validity of warehouse receipts issued under circumstances similar to those at bar was involved, the court said:

"It is insisted for appellant that the warehouse receipts issued by Holt were not warranted by section

4771, Kentucky Statutes, on the ground that he was not a warehouseman within the meaning of the statute. We do not deem it necessary to decide this point, and no opinion is intimated thereon. The evidence clearly shows that appellee was given a lien on the 113 tons of pig iron in controversy, and that it was set apart and identified beyond question. Holt had charge of it as the agent of the bank. He held it for the bank. It was placed in his possession for this purpose, and the evidence is undisputed that he informed the bank that he held the iron for it, and the bank instructed him to keep it safely. This was a valid pledge, and the circuit court properly enforced it."

To this position a change of possession is essential.

But it has been shown under the last point that there was a sufficient change of possession, and this was maintained up to the time of the bankruptcy.

VII.

IF THERE WAS NO PLEDGE, STILL PETITIONERS ACQUIRED EQUITABLE LIENS THAT ARE SUPERIOR TO THE TITLE OF THE TRUSTEE IN BANKRUPTCY.

1. Upon the question, whether an equitable lien existed, the Illinois law is controlling. It is no longer an open question in that state, that the delivery by Rodgers of these receipts, as security for loans, even if no actual change of possession took place, created equitable liens in favor of petitioners. This identical question is decided in

Union Trust Company v. *Trumbull,* 137 Ill., 146,

where the endorsement of similar warehouse receipts,

issued by the same storage company, did not constitute a valid pledge, because there was no change of possession, but it was held to create an equitable lien, the court saying (p. 175):

"It is, however, insisted, that even if there was no valid legal pledge of the wool which was in the warehouse at the time of the assignment, yet that, under the circumstances of the case, the holders of the warehouse receipts are entitled to an equitable lien thereon, which, although not recognizable at law, a court of chancery will enforce. * * * These receipts were issued by a duly incorporated storage company, and expressly stated upon their faces that the company had received and was in possession of the number of pounds of 'unwashed wool.' * * * The receipts, upon their faces, indicated that the storage company had complied with the law. * * * The receipt holders were without notice of any fact in derogation of the validity of their receipts. There was an intention and an ineffectual attempt to secure the repayment of the borrowed moneys by creating valid legal pledges. Equity regards that done which ought to be done."

Equitable liens have also been upheld by this court in

Hauselt v. *Harrison*, 105 U. S., 401;
Walker v. *Brown*, 165 U. S., 654.

2. The question, then, is, whether such equitable lien is superior to the title of the trustee in bankruptcy.

It was expressly so held under the bankrupt act of 1841.

Fletcher v. *Morey*, 2 Story, 555; Fed. Cas., 4,864.

Winsor v. *McLellan*, 2 Story, 492; Fed. Cas., 17,887.

Such, also, was the law under the bankrupt act of 1867.

Hauselt v. *Harrison,* 105 U. S., 401.
Yeatman v. *Savings Inst.,* 95 U. S., 764.
Stewart v. *Platt,* 101 U. S., 731.

Does, then, the present bankrupt act intend to change this rule? Its provisions, so far as they have any bearing on this question, are (italics ours):

"Sec. 67. Liens. (a) Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate. * * *

(d) Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act.

(e) That all conveyances, transfers, assignments, or encumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and *within four months prior* to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, *except as to purchasers in good faith and for a present fair consideration;* and all property of the debtor conveyed, transferred, assigned, or encumbered *as aforesaid* shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or encumbrances of his property made by a debtor at any time *within four months prior* to the filing of the petition against him,

and *while insolvent*, which are held null and void as against the creditors of such debtor by the laws of the state, territory, or district in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt."

"Sec. 70. Title to property. (a) The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law *with the title of the bankrupt*, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all * * * (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him. * * *

(e) The trustee may avoid *any* transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, *unless he was a bona fide holder for value* prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, *except a bona fide holder for value.*"

Considering first these clauses separately—

Clause (a) of Sec. 67, standing by itself, seems to declare that in states, like Illinois, where an equitable lien does not prevail against attachments and executions, it is not enforceable against the bankrupt's estate.

Clause (d) of Sec. 67, standing by itself, makes such an equitable lien superior to the trustee's title. The

word "necessary" in this clause is equivalent to "required by the statute of the state." It declares that liens "accepted in good faith and not in contemplation of, or in fraud upon this act, and for a present consideration," and recorded,—when of a kind the state law requires to be recorded,—shall be upheld, notwithstanding the other provisions of the bankrupt act. Clearly this clause is not confined to liens that are recordable, or required to be recorded, but applies equally to liens, the recording of which the state law does not contemplate. Otherwise, the phrase "if record thereof was necessary," etc., would be out of place.

Of this character are equitable liens. There is no provision in Illinois for the recording of such liens. Indeed, such a provision would not be feasible, as equitable liens frequently arise out of acts—and sometimes out of acts amounting to estoppels—not reducible to documents, and hence not susceptible of being recorded.

Reading these clauses (a) and (d) together, as they should be, the proper construction is (1) that liens "accepted in good faith," etc., and which are of a nature to be recorded, such as chattel mortgages, are not good against the estate unless recorded; but (2) that liens "accepted in good faith," etc., but not of a nature to be recorded, shall be unaffected by the bankrupt act, although not superior to writs of attachment and execution.

This will be more apparent by considering the subsequent clauses above quoted.

Clause (e) is confined (1) to fraudulent conveyances

within four months prior to the filing of the petition in bankruptcy, which are made "null and void" by force of the bankrupt act itself, and without reference to any state law, and (2) conveyances *during insolvency* and within said four months, which are by the state law invalid as to creditors. The only relevancy of this clause to the present inquiry is, that it emphasizes the purpose of the bankrupt act to protect "purchasers [and encumbrancers] in good faith and for a present fair consideration."

Clause (a) of Sec. 70 above quoted, defines the *title* which the trustee takes. In strict logical order it should perhaps have preceded the above provisions of Sec. 67. It vests in the trustee *only* "the title of the bankrupt" to the property enumerated in its six numbered paragraphs. Under this clause the title to the seed in controversy vested in the trustee subject, not only to any pledge or mortgage, but to this equitable lien; that is, he took the title in the same plight in which the bankrupt held it.

That Congress used the words "title of the bankrupt" advisedly and in this sense, seems apparent from the fact that, under former bankrupt acts, this court had uniformly held that the assignee in bankruptcy took subject to liens and equities—that is, in the same plight in which the bankrupt held—and that the only further right the assignee took was the right, not of the bankrupt, but of his creditors, to avoid fraudulent conveyances.

But it is suggested that subdivision (4) of this clause shows that something more than the title of the bankrupt is here contemplated, because a bankrupt has him-

self no title to property fraudulently transferred by him. But this is not always true. If a fraudulent transfer is other than an absolute one, the bankrupt still has title subject to the encumbrance.

Again it is said that this clause is not to be confined to the title of the bankrupt, because subdivision (5) thereof refers to property which might have been sold under judicial process, and, under the Illinois law, this seed might have been levied upon and sold free from the equitable lien.

This view can only prevail by nullifying the controlling words, "title of the bankrupt"; but, in construing a statute, all words are, if possible, to be given effect. Phrases, like subdivision (5), which are general in their terms and made broad, by way of caution, should not, in construction, be allowed to lessen definite phrases like "title of the bankrupt."

But any reasonable doubt as to the intention of Congress disappears when clause (e) of Sec. 70, above quoted, is considered. It is this clause, and not subdivision (4) of clause (a), Sec. 70, that confers upon the trustee the right to avoid fraudulent conveyances made more than four months before the proceedings in bankruptcy. It confers upon the trustee the right to avoid any transfer—whether absolute or by way of security—of the bankrupt, which any of his creditors might, under the state law, have avoided, *provided* the person, against whom recovery is sought, is not "a *bona fide* holder for value." It emphasizes, what is also apparent in clause (e) of Sec. 67, that the intention of the bankrupt act is to preserve the rights of innocent persons. Considered by itself, this clause clearly

preserves the rights of persons—such as petitioners are—who innocently and for a present consideration, have acquired equitable liens upon the property of a bankrupt.

Considered in connection with the other clauses, the result is the same. This clause (e) must, being the latest, be deemed a limitation, in favor of innocent holders for value, upon any right conferred upon the trustee by any prior provision of the act. Hence it is a limitation or qualification of clause (a) of Sec. 67. This is well expressed by District Judge Clark in an unpublished opinion, in a case, in the United States Circuit Court for Tennessee, involving the validity of warehouse receipts issued by the warehousing company involved in said case No. 424.

"It seems open to the trustee, under the above statute, to follow the property fraudulently conveyed, or the proceeds of such property, into the hands of whoever may have received it, until a *bona fide* purchaser is reached, and that the statute makes this a limit, beyond which the trustee may not go. * * * The creditor's right is passed to and vested in the trustee by operation of the bankruptcy law subject to the limitation that the right of a *bona fide* purchaser or holder must not be disturbed or divested.

The purpose to guard the right of a *bona fide* purchaser or holder is everywhere manifested on the face of the Bankruptcy Act, as amended by the act of 1903.

This protection of the right of a *bona fide* purchaser is necessary in order to uphold sound commercial policy and confidence, and to avoid inflicting upon the innocent the unnecessary and harsh disadvantage of frequent and serious loss."

As a result of construing together, and giving effect to, all the provisions above quoted, the following propositions seem to state the intention of Congress:

1. The trustee is first vested with the *title of the bankrupt* to all property fraudulently conveyed, and to all property the latter might have transferred, or which might have been sold under legal process against him; that is, *with the estate of the bankrupt in the same plight, in which the bankrupt held it.*

2. The trustee is also invested with the right to avoid all liens that are invalid against creditors, except those taken in good faith and not in contravention of, or in fraud under, this act, and for a present consideration, and—when required by the state law to be—recorded. This is without regard to what the state law is.

3. The trustee is further invested (independent of any state statute) with the right to avoid conveyances in fraud of creditors made within four months of the bankruptcy proceedings, except as against purchasers in good faith and for a present consideration. He may also avoid such transfers, made *during insolvency* and within said four months, as are invalid against creditors by the state law.

4. The trustee is invested with the power, beyond the four months, to avoid *any* transfer, whether absolute or by way of security, which, under the state law, is not good, against any creditor of the bankrupt, *provided this does not involve a recovery from, or encroachment upon, the right of a bona fide purchaser or holder for value.* This protection to a *bona fide* holder is a limitation imposed by the bankrupt statute, and exists, although not in the state law. In other words, an equitable lien in favor of an innocent holder for value is superior to the title of the trustee, although

under the state law, as in Illinois, it would not prevail against attaching creditors.

The reason for this is emphasized by the facts recited in the referee's report. The receipts taken by petitioners as security for these loans, recite that the property therein described is *in the possession* of the storage company. If this was not the fact, the bankrupt is chargeable with knowledge of it. Petitioners are not. These loans were made, and receipts taken, in the regular course of their business. The referee finds that petitioners acted in good faith. The Circuit Court of Appeals assumes that they are "*bona fide* holders, for value and without notice, of these warehouse receipts, giving therefor a full consideration." (Rec., 392.) When, therefore, Rodgers tendered the receipts and obtained money thereon, he was guilty of a legal fraud upon petitioners, if the Storage Company was not in possession. He obtained, by representing a fact which did not exist, money from petitioners, who, unlike Rodgers, were in ignorance of the truth. This should estop this bankrupt from claiming that these receipts were not what they purported to be. Does an estoppel, binding upon the bankrupt, also bind his trustee in bankruptcy? If not, then trustees and creditors are, by the bankrupt act, permitted to profit by the misconduct or fraud of the bankrupt.

Should such an intention be imputed to Congress? If such was the intention, would not so radical a departure from the previous bankrupt acts have been more clearly expressed?

The following cases hold the trustee in bankruptcy

under the present act is estopped, when the bankrupt is:

In re Standard Laundry Co., 116 Fed., 476; 53 C. C. A., 644.

Pennington v. *Hunt*, 20 Fed., 195.

In *First National Bank* v. *Penn. Trust Co.*, 124 Fed., 968, 60 C. C. A., 100 (heretofore cited under Point V), where there had been a setting aside of iron by way of pledge, accompanied by signs placed thereon indicating the pledge, which, however, had, without the knowledge of the pledgee, been removed by the pledgor before bankruptcy proceedings, the Circuit Court of Appeals decided that the trustee took subject to the lien of the creditor, saying:

"The transaction was one made in the ordinary course of business, without fraud either in fact or in law; it was for a present valuable consideration, and completed more than four months before the adjudication of bankruptcy. * * * It may be that an innocent purchaser for value, or a judgment creditor without notice, might, by execution and levy, have acquired a prior lien; but surely, as against the pledgor, the bank's lien remained, notwithstanding the removal of the signs. Neither the general creditors nor the receiver of the bankrupt could acquire any better title to any property of the bankrupt than the bankrupt himself had at the time of filing the petition in bankruptcy, and therefore the lien was good as against them. The receiver in bankruptcy, standing in the place of the trustee, takes the property in question 'as a purchaser from the bankrupt, with notice of all outstanding rights and equities.' Whatever the bankrupt might do to make the property available to the general creditors, he may do nothing more, except that he may sue for and recover that which was conveyed in fraud of creditors."

It is difficult to distinguish this case, as respects the question under consideration, from the one at bar. In each case the bank made a loan in the regular course of its business, and in doing so relied upon a change of possession, and was not chargeable with any knowledge that it did not exist. In each case, by the state law, an attachment or execution writ would have prevailed over the creditor's lien. Thus, as respects the present question, this case seems on all fours with the one at bar.

There is, however, a pronounced conflict in the views of the lower courts respecting the construction of the above provisions of the bankrupt act, as applied to somewhat kindred questions, arising upon unrecorded chattel mortgages, fraudulent conveyances, etc. It is not the purpose of this brief to review these cases in detail. A number of them are here listed.

In re Economical Printing Co., 110 Fed., 514, 49 C. C. A., 133.

There the Circuit Court of Appeals of the Second Circuit held that a chattel mortgage—which has ceased to be valid as against the mortgagor's creditors or purchasers, because not refiled within a year, as required by the New York statute—is superior to the title of the bankrupt's trustee, although an attachment or execution writ would have been superior to such lien.

The same court announced the same rule in

In re Garcewich, 115 Fed., 87, 53 C. C. A., 510,

as follows (p. 89):

"Under the present bankrupt act, as under previous bankrupt acts, the trustee takes the property of the

bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provision of the act."

In

Hewit v. *Berlin Machine Wks.*, 194 U. S., 296,

this court seems to cite with approval the first of the above cases, and as pertinent, a like decision by Judge Story under a prior bankrupt act.

In re Standard Laundry Co., 116 Fed., 476; 53 C. C. A., 644.

There the Circuit Court of Appeals of the Ninth Circuit held that, when a bankrupt had bought property by bill of sale, *subject* to a chattel mortgage which he assumed to pay, a valid lien was thereby created as against the trustee in bankruptcy, although the mortgage was void as to creditors because not executed in accordance with the California chattel mortgage statute. The court said:

"By the terms of its purchase of the property it is estopped from denying the validity of the mortgage or of its own obligation to Muller. In a case of this character the trustee, representing the creditors, stands in the shoes of the laundry company, and is in privity with it, so far as the title of the property is concerned. He has the same rights that the laundry company has; no more. As the bankrupt is estopped from denying the validity of the mortgage, so is the trustee."

And after reviewing the cases, the court held that the attitude of the trustee in this respect does not differ from that of the assignee under the former act.

In re Chase, 124 Fed., 753; 59 C. C. A., 631.

There the Circuit Court of Appeals of the First Circuit in allowing an assignee, under a voluntary assignment, for the benefit of creditors, priority for his disbursements and compensation incurred and rendered prior to bankruptcy proceedings, held that the trustee in bankruptcy had no equities greater than those of the bankrupt.

In

Chattanooga Bank v. *Rome Iron Co.,* 102 Fed., 755,

a lien upon an equity in property, which had been placed in storage, was, by the District Court of Georgia, held superior to the trustee's title.

In

In re Josephson, 116 Fed., 404,

Judge Speer held that a trustee in bankruptcy took subject to the lien of an unrecorded chattel mortgage.

In re Hinsdale, 111 Fed., 502, and

In re Sewell, 111 Fed., 791,

uphold conditional sales as against the trustee in bankruptcy, although not, under the state law, valid against attaching creditors.

Other cases assert the superiority of the trustee's title to unrecorded chattel mortgages, etc.

Chesapeake Shoe Co. v. *Seldner,* 122 Fed., 593, 58 C. C. A., 261 (4th Cir.) (conditional sale).

In re Pekin Plow Co., 112 Fed., 308, 50 C. C. A., 257 (8th Cir.) (unrecorded chattel mortgage).

In re Butterwich, 131 Fed., 371 (conditional sale).

In re Thorp, 130 Fed., 371 (unrecorded mortgage).

Hence petitioners have at least, equitable liens, that are superior to the title of the trustee.

Respectfully submitted in the belief that the order of the Circuit Court of Appeals ought to be reversed, and that of the District Court affirmed.

HENRY S. ROBBINS,
Counsel for Petitioners.

WALLACE HECKMAN,
JAMES G. ELSDON,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 139.

THE FIRST NATIONAL BANK OF CHICAGO ET AL.,
PETITIONERS,

vs.

THE CHICAGO TITLE AND TRUST CO., TRUSTEE,
ET AL.

REPLY BRIEF FOR PETITIONERS.

HENRY S. ROBBINS,
Counsel for Petitioners.

WALLACE HECKMAN,
JAMES G. ELSDON,
Of Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 14262

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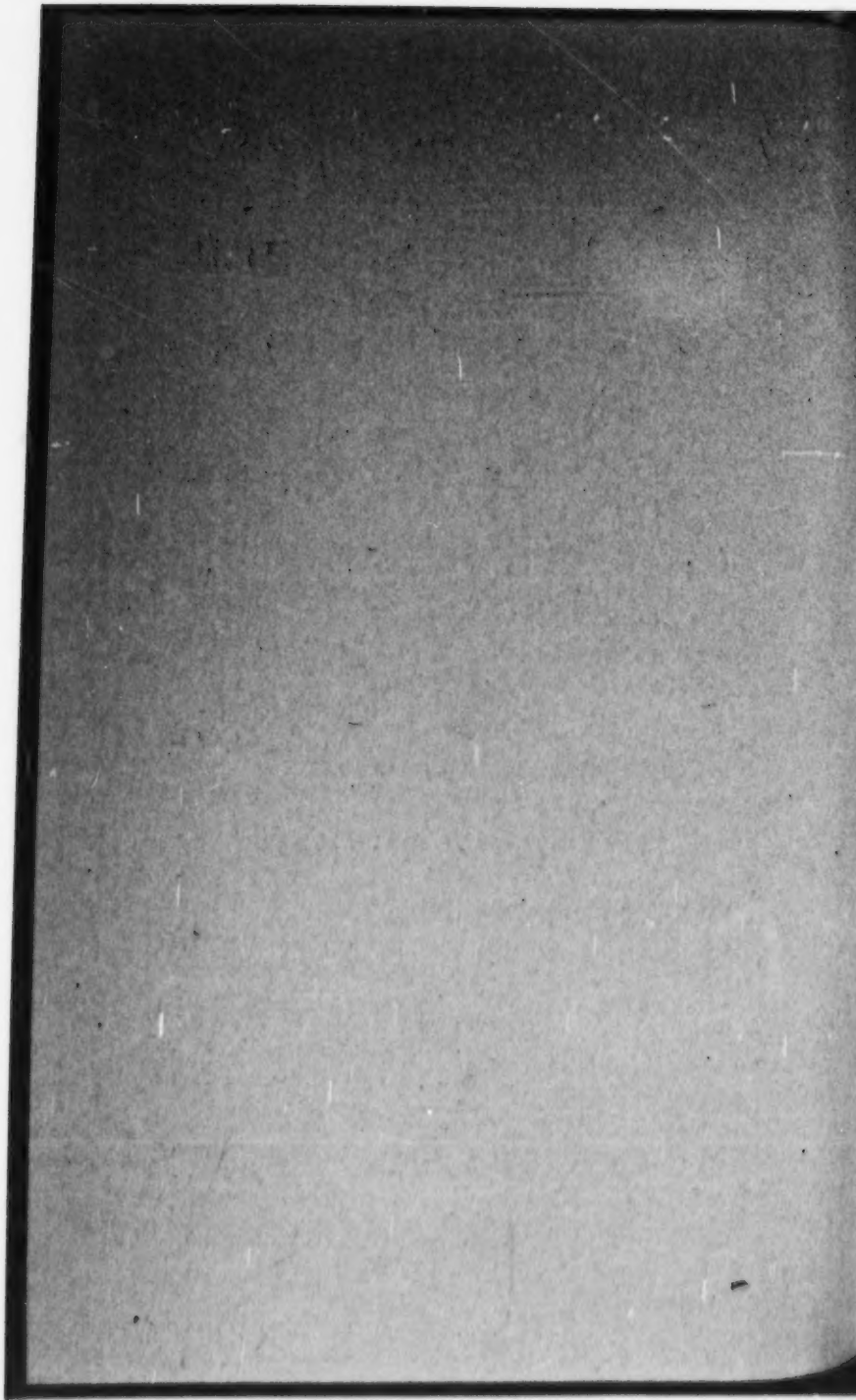

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1904.

No. 139.

THE FIRST NATIONAL BANK OF CHICAGO ET AL.,
PETITIONERS,

vs.

THE CHICAGO TITLE AND TRUST COMPANY,
TRUSTEE OF ALEXANDER RODGERS, BANKRUPT, ET AL.,
RESPONDENTS.

CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

In reply to respondents' brief, petitioners wish to direct the attention of this honorable court, very briefly, to a single question, namely: *Did the removal by the bankrupt of the lots of seeds referred to by the referee in his report (Rec., 36) and the substitution of other lots of the same kind and quality of seed for those so removed invalidate the pledge?*

There is no question of actual fraud in the case. The conduct of all the parties was found by the referee (Rec., 42) to

have been in good faith, with no intent to cheat or defraud any one. Respondents, on the question as to the effect of the substitutions, cite—

Snydacker *vs.* Blatchley, 177 Ill., 506.

But in that case the court expressly held that, since the writing contained *words of conveyance*, it was a *chattel mortgage* within section 1 of the mortgage law of Illinois. That case applies the rule regarding conveyances, which gives effect to them only so far as the specific property thereby attempted to be conveyed and therein described is concerned. In such a case the validity of the transaction depends wholly upon the instrument of conveyance, and to make such an instrument cover other property than that expressly conveyed by it would plainly be to give effect to a *verbal* understanding or agreement as a *mortgage*, contrary not only to the Illinois statute concerning mortgages, but to the plainest principles of law.

But in the case of a *pledge*, as in the case at bar, the validity of the transaction does not depend, in any sense, upon an instrument of conveyance or other instrument of writing, but solely upon the *delivery of possession of the thing pledged*. It would seem apparent, therefore, that whenever specific property is so delivered, whether originally or by way of substitution, that moment the pledge becomes effective, to continue so long as the possession continues, and irrespective of whether the property so held is by way of substitution or otherwise.

The Illinois chattel mortgage statute has no application to a pledge or to a warehousing of goods. This court, as well as the supreme court of Illinois, has expressly held that

that act refers only to mortgages, trust deeds, or other conveyances of personal property, and not to conditional sales, agreements, consignments, leases, and other transactions involving personal property, which do not involve the execution of a *conveyance* of personal property for the purpose of creating a mortgage lien.

C. & A. R. R. Co. *vs.* Union Rolling Mill Co., 109 U. S., 702 (pg. 724).

Gilbert *vs.* National Cash Register Co., 176 Ill., 288 (pg. 294).

It is a general rule that chattel mortgage acts do not apply to *pledges*.

22 Am. and Eng. Encyc. of Law (2d ed.), pg. 845.

Pearshall *vs.* Eggert, 54 N. Y., 18.

And the right to pledge property exists independently of any statutes, and rests upon the doctrine of the common law.

22 Am. and Eng. Encyc. of Law, pg. 845.

A clear distinction seems to be made by the authorities between a mortgage and a pledge, and it seems to be uniformly held that, in cases of a *pledge*, a substitution, even with the consent of the pledgee, does not in any respect invalidate or affect the pledge, but the property which is substituted for the removed property is held in lieu of the latter.

Colebrooke on Collateral Security (2d ed.), sec. 15.

22 Am. and Eng. Encyc. of Law (2d ed.), pg. 862.

Clark *vs.* Iselin, 88 U. S., 360 (pg. 368).

Cook *vs.* Tullis, 85 U. S., 332.

Sawyer *vs.* Turpin, 91 U. S., 114.

Fidelity Ins. Co. *vs.* Roanoke Iron Co., 81 Fed., 439.

Cherry *vs.* Frost, 7 Lea (Tenn.), 1.

Blydenstein *vs.* N. Y. S. & T. Co., 67 Fed., 469.

The case at bar was one of pledge, and the fact that substitutions occurred as to some of the pledged property without the knowledge of the storage company or petitioners would therefore appear to be immaterial.

Union Trust Co. *vs.* Trumbull, 137 Ill., 146, is sufficient authority that substitutions do not invalidate an equitable lien.

Respectfully submitted,

HENRY S. ROBBINS,
Counsel for Petitioners.

WALLACE HECKMAN,
JAMES G. ELSDON,
Of Counsel.

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Supreme Court, U. S.
FILED
JAN 14 1899
JAMES H. McKENNEY, Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1898.

THE FIRST NATIONAL BANK OF CHICAGO, H. W. ROGERS and JAMES C. ROGERS, as H. W. ROGERS & BROTHER, *Petitioners*

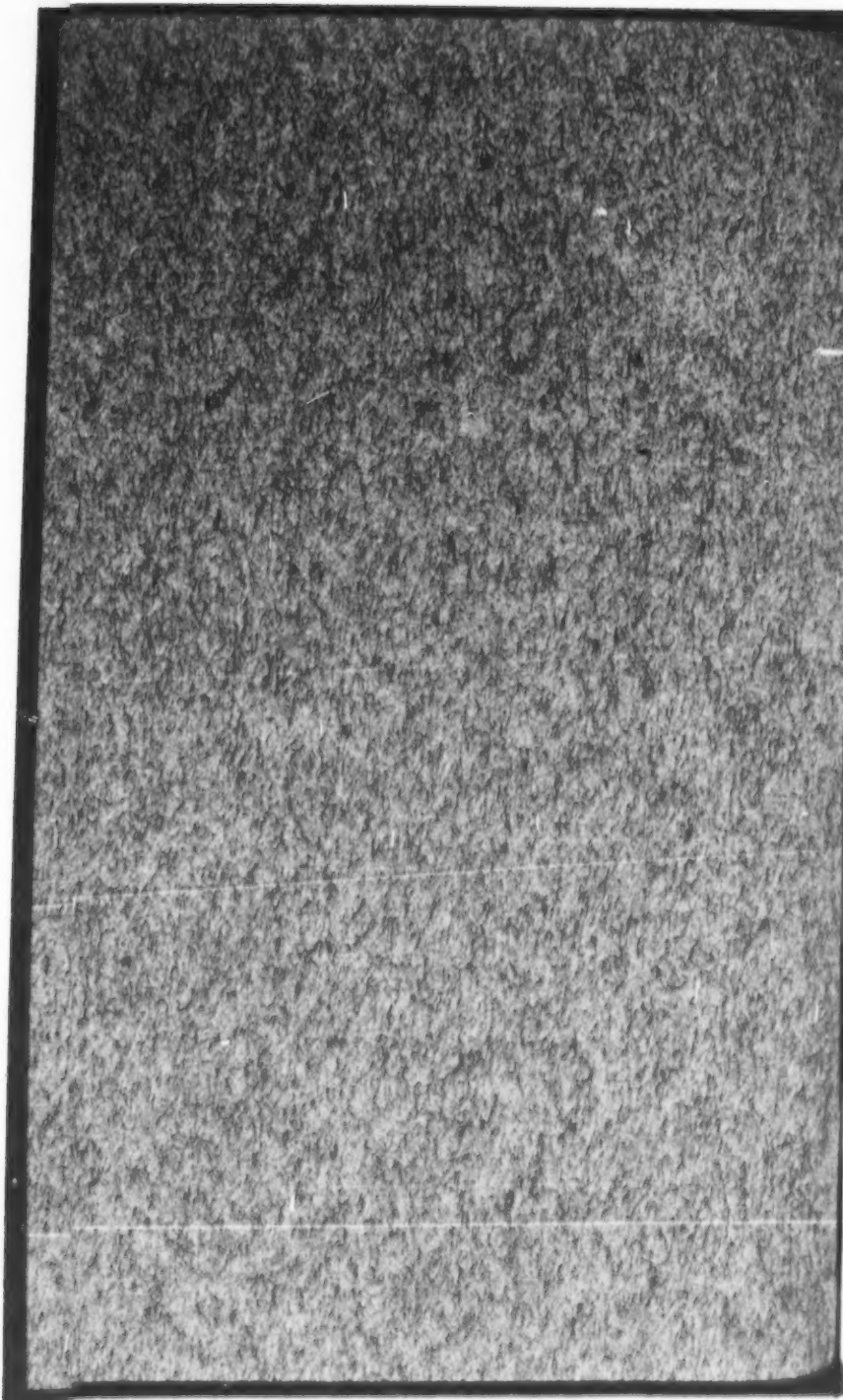
vs.

THE CHICAGO TITLE & TRUST COMPANY, *Trustee of* ALEXANDER ROGERS, *Deceased*, JAMES A. PATTEN *et al.*, *Respondents*

Petition for Certiorari.

OBJECTIONS OF TRUSTEE AND JAMES A. PATTEN TO THE ISSUANCE OF THE WRIT.

JOSEPH M. PATTEN and
NEWTON WYMAN,
For Respondents, Trustee and James A. Patten.



IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1903.

THE FIRST NATIONAL BANK OF CHICAGO, H. W. ROGERS and JAMES C. ROGERS, as H. W. ROGERS & BROTHER, *Petitioners,*

vs.

THE CHICAGO TITLE & TRUST COMPANY, Trustee of ALEXANDER RODGERS, Bankrupt, JAMES A. PATTEN et al., *Respondents.*

Petition for Certiorari.

OBJECTIONS OF TRUSTEE and JAMES A. PATTEN TO THE ISSUANCE OF THE WRIT.

It is with reluctance that the respondents, the Chicago Title & Trust Company, Trustee, and James A. Patten, yield to the conviction that it is necessary to make a more detailed statement of the pleadings and also of the facts in this case than has been made by Petitioners. It is their opinion, however, that some important matters have been omitted and that an additional brief statement of both should be made that this court may be accurately advised of the condition of the record. The argument as to the legal questions involved should properly follow these statements and they therefore present their objections to the petition for the writ of *certiorari*, and respectfully submit their argument and comments in the following order:

I. As to the Pleadings.

II. As to the Facts.

III. As to the Law of Illinois Relating to the Validity of the Alleged Liens Sought to be Enforced.

IV. As to the Right of Appeal to the United States Circuit Court of Appeals.

V. As to the Right of the United States Circuit Court of Appeals to Treat the Appeal as a Petition for Review, if the Appeal was Technically Improper.

VI. As to the Rights and Title of the Trustee Against Secret or Fraudulent Lien Holders.

I.

As to the Pleadings.

The voluntary petition in bankruptcy was filed by Alexander Rodgers, the bankrupt, on May 8, 1901, and the respondent, Chicago Title and Trust Company, was appointed receiver the same day (Rec., 2). The bankrupt at once turned over to such receiver all of his property, including certain seed upon which the petitioners claim a lien by virtue of certain so-called warehouse receipts issued by the National Storage Company, and on May 13, 1901, the receiver filed a petition for leave to sell the seed and hold the proceeds subject to the rights of all parties and the further order of the court (Rec., 5-6). The petitioners herein, the First National Bank of Chicago and H. W. Rogers & Bro., filed special appearances setting up their alleged liens, denying that the receiver had possession of the property, and therefore challenging the

jurisdiction of the court to make the order (Rec., 8-11 and Rec., 12-15). The storage company filed a similar answer and other parties also answered, and on May 20, 1901, an order was entered referring the several petitions and answers to the referee to take proofs and report his conclusions and recommendations to the court (Rec., 28). On August 5, 1901, the referee's report was filed, with which he returned a transcript of all the testimony taken and from which testimony he concluded that the National Storage Company at the date of the appointment of the receiver, was in possession of the premises of the bankrupt and of the property described in the so-called warehouse receipts, qualified by certain findings of fact showing the nature of that possession, and that the District Court was without jurisdiction and recommended that an order be entered finding the receiver was not entitled to the possession of the property described in such receipts (Rec., 29-45). Objections and exceptions were filed by respondents to this report and on August 5th, 1901, upon the hearing upon said report, the petitions, answers, etc., an order was entered in the District Court finding that "the said receiver received and took possession from the bankrupt peaceably the property in question, namely, the several lots of seed described and set forth in the answers of the First National Bank, H. W. Rogers and Brother and the National Storage Company, in the warehouse 220 to 230 Johnson street, Chicago, and that the court had jurisdiction and possession of the said property in this cause and the court sustains the objections and exceptions to said report as to the jurisdiction and possession of the court." In the same order the court also found on the advice of counsel for all the parties—"all parties being in open court"—that the seed should be sold at once and by

agreement it was ordered that it be sold by the First National Bank and the funds held subject to the further order of the court (Rec., 54-55). The present petitioners did not appeal from this order holding adversely to them as to jurisdiction. The property was sold and report of sale made to the court (Rec., 56 to 66). On September 16, 1901, the First National Bank filed a petition entitled, "Petition of the First National Bank of Chicago for allowance of claim," in which it set forth certain indebtedness and the delivery to it of these so-called warehouse receipts as security therefor, by virtue of which it claimed an equitable lien (Rec., 70), as afterwards amended, a lien (Rec., 114), on proceeds of the sale in its hands and prayed that its "claim may be allowed and that the same may be satisfied and paid out of moneys now on deposit," etc. On September 23, 1901, H. W. Rogers & Bro. also filed a petition alleging an indebtedness of the bankrupt to them and the delivery of these alleged warehouse receipts as security therefor and asking a rule on the receiver to show cause "why an order should not be entered herein directing the payment to your petitioners of the amount of said note, principal and interest according to the terms thereof, out of the proceeds of the sale of said seed" and pray for "such other or further or different relief in the premises as the nature of the case may require and as to *equity* shall seem meet." (Rec., 80-83.) Neither the petitioners nor the National Storage Company filed their claims for allowance as debts under the Bankruptcy Act. Objections by way of answer were filed to these petitions and to the claims set forth therein by these respondents, denying the grounds of relief, and alleging, with other things, that the Storage Company had never had possession or control of the premises of the

bankrupt, or any portion of the seed involved, but that the bankrupt had always had such actual possession and control, and in the regular course of his business had sold and disposed of many of the lots of seed supposed to be called for by the alleged warehouse receipts, and had substituted other seed in the place thereof. (Rec., 84-96.) On October 11, 1901, an order was entered consolidating the petitions for hearing and referring the same to the referee to take additional proof and report same to the court, and that thereupon the matters involved in said petitions and answers be heard on such evidence and the evidence heretofore taken by the referee (Rec., 109). On October 29, 1901, as appears from the decree entered of that date the whole matter was heard, both as to the original petition filed by the receiver and answers thereto *and* the subsequent petitions filed by the First National Bank and H. W. Rogers & Bro., in which decree the court found that it had jurisdiction, that the receiver on May 13, 1901, had no right of possession of the property, that the National Storage Company had possession at that date and when the petition in bankruptcy was filed, that the First National Bank had a claim against the bankrupt of $9,854.15 and interest and that H. W. Rogers & Bro. had a similar claim of $5,000 and interest, and directing the payment of such claims out of the proceeds of the sale of the seed in the hands of the First National Bank (Rec., 114-116). It will thus be seen that this final order was entered upon the prayer of the present petitioners in this court as much as upon the original petition filed by the receiver for the sale of the seed.

We cannot conceive of a more forcible manner in which in a proceeding instituted by a trustee, the adverse parties or "proposed defendants" could consent thereto. (See

Bankruptcy Act, Sec. 23 (b).) The respondents excepted to said decree and prayed an appeal therefrom to the United States Circuit Court of Appeals, which was allowed. Both of petitioners herein, The First National Bank of Chicago and H. W. Rogers & Bro., entered their general appearance in the Circuit Court of Appeals, (Rec., 368, 369, 373, 374) without questioning the jurisdiction of that court. The cause was argued by printed briefs and orally in their behalf (Rec., 372) and as stated by their present counsel in their brief filed in this court (page 11), "the point of jurisdiction of the subject-matter was made * * * only on the petition for rehearing." In other words, their attitude was this—they desired the Court of Appeals to affirm the decree of the District Court, but afterwards when the court had reversed the decree of the District Court, they maintained the Court of Appeals had no right to hear the case at all.

II.

As to the Facts.

The facts are so fully and fairly set forth in the statement and opinion of the Court of Appeals, that we should perhaps content ourselves by simply referring thereto. The case was fully argued in that court orally and elaborate printed briefs and arguments were submitted. The statement of facts made by that court, therefore, is apt to be more correct and unprejudiced than any made by counsel. We desire to present very briefly, however, some matters not fully covered therein.

It may be true, as claimed by counsel in their brief, that the National Storage Company was authorized by its charter to issue lawful warehouse receipts. What it was

authorized to do, however, and what it actually did in this case, are two very different things. The National Storage Company purported to lease from Alexander Rodgers, the bankrupt, all the premises occupied and used by him (compare lease, Rec., 214-215, with lease, Rec., 131-132, as explained by testimony, Rec., 215, 216; also referee's report, Rec., 31), and not a portion, as stated in counsel's brief. Under Section 4 of its agreement with Rodgers (Rec., 129), it was authorized to build on the premises enclosures in which to store property on which receipts were issued, but this in fact was never done. "The floors were large, open floors, about sixty by one hundred feet in size, and have no partitions." (Rec., 35.) Theoretically it took possession of the property and held it until the receipts were canceled, but actually it did nothing of the kind. It permitted Rodgers to exercise the same authority and control over it, that he did before the receipts were issued. On this point the testimony of Mr. Rodgers is uncontroverted. After discussing his premises and his method of handling and selling seed, etc., he stated as follows (Rec., 216):

> "I used those premises all the time in the way that I have described, ever since I have been there. Have used the premises since August 1, 1900 (date of storage company's lease), in just the same way. There has been no change whatever in the way I handled it. I used the premises just the same all the time since I have had them."

The storage company never had any keys to the premises and never exercised any acts of possession over them. It paid no rent and its possession was a fiction pure and simple. In the language of the opinion of the Court of Appeals the bankrupt

> "remained in possession of the premises as before the agreement, continuing to transact his business there

as he had formerly done. There were certain signs placed upon the different floors of the building, indicating that the storage company controlled the premises. These were small and obscure signs, not likely to attract attention, and most of them hidden behind the piles of bags of seed. No sign was displayed upon the exterior of the building indicating any proprietorship of the storage company, or giving notice to the world that any other than the bankrupt had possession and control. There was no open, notorious manifestation of a change of possession, none was intended, and there was none in fact. Upon each pile of bags of seed for which the warehouse receipts or warrants were issued, there was placed a small tag, which might be discovered upon careful search. The bankrupt substantially treated the property as his own; at times going through the forms prescribed by the storage company; and whenever he found it necessary, ignoring them."

The use of the above signs was the only means employed by the storage company to take its alleged possession of the premises, or of any of the seed on which it issued its so-called warehouse receipts, except that in the latter case one of their employes claimed he went upon the premises occasionally to count the bags for which such warrants were issued.

We have set forth the above facts fully for the purpose, among other things, of showing the ludicrousness of the finding of the referee that the storage company had the possession of the premises and seed. This finding was confirmed by the District Court, and great stress is laid upon these findings by counsel for petitioners. In truth, no ultimate fact was found by the referee or by the District Court as to possession, but the conclusion of law as to possession was reached from the above facts. The District Court wrote no opinion and gave no reasons for its finding, but we have the process by which the referee

reached his conclusion, fully set forth in the report which the District Court approved in its decree. In this report (Rec., 31) he says:

> "Upon the execution of the lease, the National Storage Company proceeded to take possession of the premises leased by it from the bankrupt *by tacking on the walls of the several floors notices, each being made of enameled tin, about three by seven inches in size, with white letters on dark blue ground, said signs being eight in number, and distributed on the several floors and containing the following: 'This property controlled by the National Storage Company, as public warehouse, warehouse premises No. 281.' Said signs were placed some seven or eight feet from the floor on the side of the building and on the partitions between the premises in question and the electric company. No signs were placed on the outside of the building.*"

He then finds (Rec., 32) that on each lot of bags for which a so-called warrant was issued, the company placed a card four by six inches in size, on which was printed in letters, about one-quarter inch in height, the following words:

WAREHOUSE CARD.

NATIONAL STORAGE COMPANY.

DATE AUGUST 31, 1900.

LOT NO. 8, SEC. NO. 8.

250 BAGS.

TIMOTHY SEED.

NO DISTURBANCE PERMITTED WHILE THIS CARD IS POSTED.

These eight tin signs, scattered over six stories and a basement, all large in area, and one of these small cards on each pile of seed, being all the evidence of possession found, he reaches the following conclusion (Rec., 41):

> "I think the lease made to it by the bankrupt, and the possession thereunder, *as herein set forth,* was sufficient for the purpose of accomplishing the end desired, namely, to be sufficient to entitle the storage company to the possession of the premises, and its possession was thereby sufficient to entitle it to issue receipts on property placed in its custody."

III.

As to the Law of Illinois Relating to the Validity of the so-called Liens Sought to be Enforced.

The policy of the law of Illinois is decidedly adverse to any sort of secret lien, without regard to the form adopted. The sale of goods with the reservation of the title in the vendor until the purchase money is paid, a chattel mortgage on a stock of goods which permits the mortgagor to carry on his usual trade as to such stock, the ordinary lease of sewing machines, and transactions of that character, are declared fraudulent *per se* by the laws of that state. The policy of that law is already familiar to this court, as is indicated by its decision in the case of *Hervey v. R. I. Locomotive Works*, 93 U. S., 664. In that case this court says:

> "Secret liens, which treat the vendor of personal property, who has delivered possession of it to a purchaser, as the owner until the payment of the purchase money, cannot be maintained in Illinois. They are to be held constructively fraudulent as to creditors. * * * The plaintiff cannot complain, as the laws of Illinois pointed out a way to preserve and protect his lien."

There are only two ways, under the laws of Illinois, in which a valid lien upon personal property may be given; first, by chattel mortgage, properly recorded; sec-

ond, by pledge, in which the actual and physical possession of the property is delivered to the pledgee, or to some one for him. The policy of the Illinois law was quite fully discussed in the case of the *Union Trust Company* v. *Trumbull*, 137 Ill., 146. We shall discuss that case in its bearings upon the case at bar a little more fully hereafter, but under the present heading we desire to make two brief quotations.

On page 180 of the opinion we find the following statement:

> "There is no mode under our law, except by chattel mortgage duly acknowledged and recorded, by which the owners of personal property retaining its possession can give another a lien upon it that can be enforced as against creditors and subsequent purchasers."

Again, on page 173 of the opinion we find the following statement:

> "To the existence of a pledge, the possession, either actual or symbolical, by the pledgee, of the personal property which is the subject of the pledge, is absolutely essential. Ordinarily, actual and physical possession of the property is delivered to and retained by the pledgee; but where the actual delivery is to a carrier or warehouseman, and a bill of lading or warehouse receipt is given therefor, the assignment or transfer of such bill of lading, or indorsement of such warehouse receipt, with delivery thereof to the pledgee, is regarded in law as the delivery of possession to the pledgee of the property which the instrument represents, the bill of lading or receipt standing in the place of the property of which it is the symbol. (*Taylor* v. *Turner*, 87 Ill., 296; *Michigan Central Railroad Co.* v. *Phillips et al.*, 60 *id.*, 190; *Barton* v. *Curyea*, 40 *id.*, 320; *Canadian Bank* v. *McCrea et al.*, 106 *id.*, 281.) But it is a necessary condition to the existence of such symbolical possession by the pledgee that the property itself is

in the possession of some person or corporation other than the pledgor. Here the endorsements and transfers of the supposed warehouse receipts to the receipt holders were ineffectual to constitute them valid and legal pledges of the wool to secure the debts for which they were hypothecated, and this, both because the National Storage Company did not have possession and control of the wool, and because the wool mentioned in each receipt was not so set apart and distinguished from other wool as that it could have been found and identified by the receipt. The storage company was not, under the law, authorized to issue warehouse receipts."

We also refer the court to the following cases:

Barnet v. *Fergus*, 51 Ill., 352.
Funk v. *Staats*, 24 Ill., 645.
Huschle v. *Morris*, 131 Ill., 591.
Chickering v. *Bastress*, 130 Ill., 206.
Murch v. *Wright*, 46 Ill., 487.
Deering & Co. v. *Washburn*, 141 Ill., 153.
Peoria Mfg. Co. v. *Lyons*, 153 Ill., 435.

IV.

The Right of Appeal to the United States Circuit Court of Appeals.

An appeal lay from the District Court, and the Circuit Court of Appeals had jurisdiction of the appeal taken. The petitioners had a right to carry the case from the Circuit Court of Appeals to this court by appeal or writ of error, and there is no occasion or necessity for a writ of certiorari.

a. The controversy in the District Court was in the nature of an independent or plenary suit, presented on the equity side of the court under its general powers, and

the right of appeal existed under Section 24 (a) of the Bankruptcy Act.

b. There was such right of appeal, also, under Section 6 of the Act of 1891, creating the Circuit Courts of Appeals which is not abridged by the Bankruptcy Act.

c. Even if this is a controversy in bankruptcy proceeding, as distinguished from an independent suit, the right of review upon facts and proof as well as law is given by the Circuit Court of Appeals, Act of 1891, and Section 24 (a) of the Bankruptcy Act.

This controversy, from its inception, through all stages, up to the time when petitioners filed their petition for a rehearing of the decree of reversal entered by the Circuit Court of Appeals, was in form of pleadings, and, in fact, a proceeding in equity, and so treated by all parties.

As pointed out above in these objections, and as appears from the pleadings and the facts of this case before as well as after the petitioners had invoked the jurisdiction of the District Court, there was a full controversy upon the facts as to who was in the actual possession of the seed and property in question at and before the time the petition in bankruptcy was filed. The District Court having entered a decree upon its view of what the facts were as presented to it in the evidence taken, these respondents took an appeal to the Circuit Court of Appeals to obtain a review of the whole case. (Rec., 350, 351, 355, 358, 359.)

The First National Bank, Rogers & Brother and the National Storage Company duly entered their unqualified appearances in the Circuit Court of Appeals (Rec., 368-370), and thereby joined in the errors assigned, and sub-

mitted nothing in objection to the character of the appeal or to the right of appeal. In fact, as they point out in their present brief on this petition for certiorari, they made objection to the jurisdiction of the Circuit Court of Appeals or motion to dismiss the appeal "only in the petition for rehearing." (Petitioners' brief, p. 11.)

What is such independent suit or controversy, it appears is plain and easy of definition. Such suit or proceeding or controversy is one which might have been instituted and litigated had there been no proceedings in bankruptcy—had there been no petition filed in bankruptcy, voluntary or involuntary—such suits or proceedings, at law or in equity, as the bankrupt might have carried on against the opposite party. They would include attempts to set aside transfers or conveyances by way of mortgage or pledge, the recovery of property, and the like. Whatever the form of the proceedings in this case, they were, in fact, the same as they would have been had the general creditors of the bankrupt attached the seed in question in the State Courts, and the petitioners here had been obliged to assert there their alleged claims and liens.

The substantial position in the present case is this: Certain alleged transfers or pledges of his property were made by the bankrupt, which were attacked by the trustee as invalid against the trustee representing the general creditors. Under certain circumstances the litigation would have fallen in the State Courts, but the character of the controversy is not altered by the simple fact that the proceeding was carried on in the District Court.

Nor, would the fact that, had the bankrupt himself brought the action in an attempt to relieve himself against the transfers or pledges, he could not prevail on account

of his own acts, alter the case. It has been clearly pointed out that Section 23 b of the bankruptcy act, does not fail of application simply because the bankrupt could not have successfully maintained the suit to set aside the transfer made by him. The question of jurisdiction is one thing; the successful prosecution of the litigation is another. The question of jurisdiction, aside the power of the court to determine the rights of the trustee and opposite parties is unquestioned, although the bankrupt himself might not recover or prevail on the facts.

> "The clause concerns the jurisdiction only, and not the merits, of a case; the forum in which the case may be tried, and not the way in which it must be decided; the right to decide the case, and not the principles which must govern the decision.
>
> "The incapacity of the bankrupt to set aside his own fraudulent conveyance is a matter affecting the merits of such an action, and not the jurisdiction of the court to entertain and determine it."
>
> *Bardes* v. *Bank*, 178 U. S., 524.

This court in the case of *Bardes* v. *Bank*, points out that Congress intended by the second cause of Section 23, that controversies not strictly or properly part of the proceedings in bankruptcy but independent suits brought by the bankrupt to assert a title to money or property as assets of the bankrupt against strangers to those proceedings, should not come under the jurisdiction of the District Court of the United States, unless by consent of the proposed defendant. Also, that the provisions of said clause control and limit the jurisdiction of all courts, including the several District Courts of the United States, over suits brought by trustees in bankruptcy to recover or collect debts due from third parties, *or to set aside transfers of property to third persons alleged to be*

fraudulent against creditors, including payments in money or property to preferred creditors.

The following cases illustrate what is a controversy or suit, not a part of administrative proceedings merely, and what is appealable and reviewable upon the facts as well as law.

Turning to the case of *Hutchinson v. Otis, in the* Circuit Court of Appeals, First Circuit (115 Fed., 937), that court says:

> "With reference to a proceeding in the District Court in the nature of a summary intervening petition under general juridical rules and not controlled by Section 57 of the Bankruptcy Act of July 1, 1898, an appellate tribunal would not be limited to matters of law, and it could pass on the entire merits, as in other ordinary appeals concerning such petitions."

In the case of *Scott & Co.* v. *Wilson*, 115 Fed., 284 (Circuit Court of Appeals, 7th Circuit), it was held that a petition filed by parties claiming certain property in the possession of the receiver was in the nature of an equitable replevin and an independent suit, and that the proceedings in the District Court were reviewable by a direct appeal, as in all cases in equity.

A case very similar to the one involved in the present case is that of *Stelling* v. *Jones Lumber Company*, 116 Fed., 261, in the 7th Circuit. The appeal from the District Court was attacked as an improper method of bringing up the case, but it was held, that the case came properly before the court by appeal. In that case the trustee asked leave to sell certain lumber in his possession, and that the Jones Lumber Company be restrained from interfering. It was held that the proceedings were not "one in bankruptcy," but were in substance a bill in equity

against a stranger, of which the court below had jurisdiction by the consent of the defendant; and also that the Circuit Court of Appeals took jurisdiction by appeal, not by virtue of the bankruptcy act, but under the general provisions of the law creating the Circuit Courts of Appeals, and cited *Boonneville Nat. Bank* v. *Blakey*, 107 Fed., 891, Circuit Court of Appeals, 7th Circuit.

Referring to Section 6, of the Circuit Courts of Appeals Act, the case of *Duncan* v. *Landis*, 106 Fed., 839 (3rd Circuit), says:

> "The language here used indicates an intention to extend the reviewing authority of the court of appeals widely enough to include all final decisions in the District Courts not otherwise provided for by law, and the writ of error referred to in this provision is applicable alike to judgments of the District Court and of the Circuit Court, where such a writ is necessary and appropriate to invoke the reviewing authority of the Appellate Court. In addition to this general and comprehensive provision of the statute establishing the Circuit Courts of Appeals, which, we think, sufficiently warrants the writ of error in this case, the Bankrupt Act of 1898, provides in Section 24 a, as follows: [Here, the court sets out said section.] We perceive nothing in the provisions of this section inconsistent with or which supercedes the provision of Section 6, Cl. 1, of the act establishing Circuit Courts of Appeals, above referred to. The language of the section conferring upon the Circuit Court of Appeals appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy over which they have appellate jurisdiction in other cases is broad and applicable to all 'controversies arising in bankruptcy proceedings.'"

The case of *Steele* v. *Buel*, 104 Fed., 968 (8th Circuit), involved a claim of exemptions by the bankrupt and denied by the trustee. It was objected that the ap-

peal was not taken within ten days, as required by Section 25 of the Bankrupt Act, and the court held, that the limitation of the section had no application, as the case did not fall under either of the three heads of that section, but it was held that the rule "applicable to this case is found in Section 24, which gives the right of appeal in absolute terms, without any limitation as to time other than that fixed by law for the regulation of appeals generally."

Petitioners do not controvert the correctness of these decisions, but seek to escape their force by now claiming that they did not consent to be sued in the District Court. Consent is not a matter of words so much as acts, as is clearly set up in *Booneville National Bank* v. *Blakey, supra.*

The doctrine of this court, as announced in *Elliott & Co.* v. *Toeppner*, 23 S. C. Rep., 133, is that Section 25 of the Bankruptcy Act is not a limitation upon the general appellate jurisdiction of the Circuit Court of Appeals, as conferred by the Act of 1891.

In *Duncan* v. *Landis*, 106 Fed., 839, cited by this court in the above case, a writ of error to review the rulings of the District Court upon a trial by jury arising in a bankruptcy proceeding was allowed, under the general appellate jurisdiction of the Circuit Court of Appeals in common law cases; it necessarily follows that the equivalent of a writ of error in a law case, namely, a general appeal in a chancery proceeding, is equally allowable though it arises in connection with a bankruptcy proceeding to enable the court of appeals to review a question of fact, or questions of fact and law. The general right of appeal in an equity proceeding to the Circuit Court of Appeals under the Act of 1891, is

equally as great as the right to a writ of error in a law case, and if the Bankruptcy Act, much less Section 25 a, of that act, is held not to limit the one right it cannot limit the other.

In a plenary or independent suit brought in the District Court, and there litigated by consent under Section 23 b, the right of a general appeal is unquestioned under Section 6 of the Act of 1891, creating the Circuit Courts of Appeals; if a suit of the same character arises in connection with bankruptcy proceedings because the subject of litigation has passed to the trustee in bankruptcy, such suit becomes "a controversy in bankruptcy proceedings," in which an appeal lies "from the courts of bankruptcy" by virtue of Section 24 a, as well as Section 6 of the Act of 1891.

V.

As to the Right of the United States Circuit Courts of Appeals to treat the Appeal as a Petition for Review, if the Appeal was Technically Imroper.

While respondents maintain with confidence that the circumstances of this case class it as an independent suit or a controversy in bankruptcy proceedings, and not as a mere proceeding in bankruptcy, they, nevertheless, present a few suggestions on the subject of petitions for review, and the taking of an appeal as informally a petition for review.

a. The point raised by petitioners is not one as to real jurisdiction, but as to matter of form and practice merely; and the case having been submitted in the Circuit Court of Appeals by all parties without objection, and

there determined, petitioners are estopped and cannot now present the point of practice.

b. The findings and report of the referee, approved by the District Court in its decree, were a part of the findings of that court and characterized the possession mentioned in the decree of the court, showing such possession to be no actual possession whatever, and such findings of the referee are a part of the findings certified to the Court of Appeals, and considered by it.

c. In such cases of informal petitions for review, by way of appeal, the Circuit Court of Appeals can consider the whole record, which has been certified up to it, and submitted by the parties without objection, as embodying the facts upon which the law is to be revised, and revise it accordingly.

It is at once obvious that there is no real question of want of jurisdiction raised, or attempted to be raised, by the petitioners, but that the point presented amounts to a mere question of practice. The "want of jurisdiction" alleged, is not of that character that requires the proceedings to be dismissed whenever the point is made or noticed; for there is no question, in proceedings of this nature, of the ample jurisdiction of the Circuit Courts of Appeals over the subject-matter of review and revision of the decisions of the District Courts.

If this case in the District Court was a bankruptcy proceeding, from the decree in which a petition for revision, and not an appeal, was the proper method to obtain a review in the Circuit Court of Appeals (if there is such limitation to a petition for revision), yet, the case having been carried to the latter court by an appeal, and that court having full jurisdiction to review bankruptcy proceedings whether by petition or appeal, and the case

having there been submitted by all parties without objection, it must now be concluded that the court itself, as well as the parties, waived all objections to the form in which the jurisdiction of that tribunal was invoked.

The jurisdictional requirement as to due notice set forth in the bankruptcy act having been satisfied in this case under the method pursued in taking the case to the Circuit Court of Appeals, as well as it would have been had the form used been that of a petition for review, and, especially, no objection having been raised at the hearing or before the decree in the Circuit Court of Appeals, the petitioners cannot now be heard to say that the mere matter of form and pleadings used in invoking the jurisdiction of the appellate tribunal was not waived by their thus submitting the case upon its merits to that tribunal, and that the court of appeals did not disregard the matter of form, and review the case as if brought before it by petition.

The very position of petitioners, that the Circuit Court of Appeals had jurisdiction to review had there been a petition for review instead of an appeal, concedes the contention that their objection goes only to the form in which the case came to that court.

Their objection, now made for the first time, being to a matter of form and not of substance, comes too late.

That the objection is upon a question of practice, and not of want of jurisdiction, has the support of a number of the Circuit Courts of Appeals.

In re Richards, 96 Fed., 935 (7th Circuit).

In re Abraham, 93 Fed., 767 (5th Circuit).

Chesapeake Shoe Co. v. *Seldner,* 122 Fed., 593 (4th Circuit).

The District Court in its decree approved and confirmed the referee's report and findings therein, except as to jurisdiction. (Rec., 114.) This made that report and the findings therein the findings of the District Court, and the finding in the decree as to the "possession" of the storage company must be taken in connection with and in view of the findings of the referee adopted by the court.

This report is found on pages 29 to 44 of the Record, and is in some of its essentials set out above under head II of these objections. The facts constituting the so-called possession as they actually were are there found, which show absolutely that there was no actual possession or control in the storage company. It is true the referee and the court drew from these findings of fact certain conclusions as to possession, which were mere conclusions of law; but the facts are there *found,* and were certified to the Circuit Court of Appeals, and that court must be taken to have revised the law thereon.

Further, it may be well maintained that where the whole evidence that was before the District Court is certified up to the Circuit Court of Appeals under the form of an appeal, although only a petition for review would be the proper practice, and is there submitted to the court without objection by the parties, and especially where there is no conflict of evidence as to the material facts, the Court of Appeals can revise the law of the whole case, as on a petition, using the evidence as the statement of facts.

In re Richards, 96 Fed., 935 (7th Cir.).

Treated as a petition for review, the decision of the court was just and proper, and is supported by other United States Courts. No reason for the granting of a writ of *certiorari* appears, either on the ground of great importance or of conflict of decisions.

VI.

As to the Rights of the Receiver or Trustee Against Secret or Fraudulent Lien Holders.

The point is made that the receiver or trustee is not in any better position to question the validity of the so-called liens in this case than the bankrupt was. In our judgment this position is not correct and we think counsel for petitioners are led into the error largely through misinterpreting the decision in the case of *Union Trust Company* v. *Trumbull, supra.* The court in that case disapproved of the attempted pledge and held in substance that it was invalid and ineffectual as against execution or attaching creditors or subsequent purchasers, but held that inasmuch as the proceedings under the state assignment law were purely voluntary and the assignee being a mere volunteer that he could not procure any transfers to be set aside, that it was not in the power of the assignee to set aside; that if the assignor could not deny their validity the assignee could not do so, and therefore it allowed the claimants in that case what was practically a lien by estoppel. The object of the present Bankruptcy Act, however, and its provisions are very different. While it provides that voluntary petitions may be filed, the right to file a petition by the creditors of the insolvent to bring him into court involuntarily always remains. Although the decision in the case of *Union Trust Company* v. *Trumbull* is not binding on this court, it is proper to compare the decision and the law which required it to hold as it did, with the present Bankruptcy Act.

In its decision in that case, at page 179, the court said:

> "The settled doctrine is, that when property is assigned by debtors for the payment of debts of the

> assignors, the assignee takes it as a volunteer, and subject to all liens, equities and burdens to which it was subject in the hands of the assignors (citing cases). This principle is recognized in Section 11 of the Voluntary Assignment Act of 1877, wherein it is provided that any assignee or assignees * * * shall have as full power and authority to dispose of all estate, real and personal, assigned, as the debtor or debtors had at the time of the assignment * * * and generally to act and do whatsoever the said debtor or debtors might have done in the premises. The general rule is, that an equitable lien is enforceable against voluntary assignees."

As against the reasoning of this decision and the provisions of the law under which it was rendered, we have the following provision of the Bankruptcy Law:

> "Sec. 70 (a). The trustee of the estate of a bankrupt, upon his appointment and qualification and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt * * * to all * * * property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

Under the law of Illinois the bankrupt unquestionably could have sold the seed in question at the date of filing the petition, or it could have been levied upon and sold under judicial process against him.

In addition to this plain provision of the Bankrupt Act the general purpose is shown through all its provisions to guard against liens and preferences. Suits and attachments under certain conditions are to be set aside, preferences declared void, pledges and mortgages annulled, et cetera. Nor can there by any difference as to the status

of his property or the title of the trustee, that the bankrupt voluntarily files his petition, than there would be if creditors file the petition. The law will certainly not be construed so as to give the trustee less title in one case than it would in the other.

In re Frazier, 117 Fed. Rep., 746.

In discussing the meaning of the paragraph above quoted from the bankruptcy act, we beg to call the court's attention to the forcible argument presented for the construction which we maintain in the closing paragraph of the opinion of the Circuit Court of Appeals for the Fourth Circuit in *Chesapeake Shoe Co.* v. *Seldner,* 122 Fed. Rep., 593:

> "If the 'title of the bankrupt,' in Section 70a, means title as between him and a consignor or vendor, this section of the act is not only utterly inconsistent with the entire spirit of the law, but the numerous decisions holding that the trustee in bankruptcy takes title to property sold to the bankrupt under unrecorded conditional contracts of sale must be held erroneous. The registry statutes of the states do not invalidate the title of the vendor by such a contract as between him and his vendee, but only as between the vendor and the creditors of the vendee. Quite aside from the violence done to the plain meaning of the words, 'title of the bankrupt * * * * to property * * * which might have been levied upon and sold under judicial process against him,' Clause 4 of Section 70a would seem to make an end of the contention here set up. The trustee takes 'the title of the bankrupt * * * to * * * property transferred by him in fraud of his creditors.' If the words, 'title of the bankrupt,' do not mean title as between him and his creditors, the language above quoted is meaningless. As between the bankrupt and his fraudulent grantee, the bankrupt has no title (*Spencer* v. *Duplan Co.* (C. C.), 112 Fed., 638), and to give any effect, or even mean-

ing, to Clause 4, we must construe the words 'title of the bankrupt as meaning title as between the bankrupt and his creditors."

The rights of the trustee in bankruptcy, and the interpretation put upon Section 70(a) of the bankrupt act by the Circuit Court of the Seventh Circuit in this case, has also the support of the following decisions:

In re Pekin Plow Co., 112 Fed., 308 (Eighth Circuit).

Spencer v. *Duplan Silk Co.*, 112 Fed., 638 (C. C.).

Duplan Silk Co. v. *Spencer*, 115 Fed., 689 (Third Circuit).

In re Garcewicz, 115 Fed., 87 (Second Circuit).

Chesapeake Shoe Company v. *Seldner*, 122 Fed., 593 (Fourth Circuit).

Stroud v. *McDaniel*, 106 Fed., 493 (Fourth Circuit).

Mueller v. *Nugent*, 184 U. S., 1.

The decision of a Circuit Court of Appeals on a petition for revision being final, *certiorari* will issue in the discretion of this court only in cases of great public importance, or where there is a conflict in the decisions of the lower courts on questions of law on which uniformity of decisions is important and possible. The rights of the trustee against secret or fraudulent lien holders is in every case affected by the policy of the law of the state where the property in controversy is located, and hence absolute uniformity of decision is impossible.

In view of the pronounced policy of the law of the State of Illinois as to the invalidity and fraudulent character of secret liens, and in view of the apparent attempt to circumvent the laws of that state by the specious device of the so-called storage warrants used in this case, we

respectfully insist that the decision of the Circuit Court of Appeals, in this case, is clearly right in law and eminently just in equity.

Respondents have set forth rather fully the condition of the pleadings in this case and have discussed the facts and the law relating thereto as briefly as possible, and they suggest in conclusion that the petition for the writ of *certiorari* should be denied for the following reasons:

1. The appeal was properly taken to the United States Circuit Court of Appeals and the petitioners could have brought the case before this court by appeal.

2. If the case in the Circuit Court of Appeals was treated as a petition for revision, the decision of that court is sustained, by the decisions of all courts of equal degree that have passed upon the same questions.

3. The decisions of the Circuit Courts of Appeals, when viewed—as they necessarily must be—in the light of the state laws where the property in dispute is located, are uniform as to the title taken by the trustee in bankruptcy.

4. In view of the laws of Illinois and the apparent attempt to evade them, which the record presents, the decision of the Circuit Court of Appeals is just and equitable.

5. No question of such grave and public importance is presented as calls for the issuance of a writ of *certiorari*.

We respectfully submit that the writ of *certiorari* be denied.

JOSEPH E. PADEN and
NEWTON WYETH,
Counsel for Respondents.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

No. 139.

THE FIRST NATIONAL BANK OF CHICAGO, H. W. ROGERS and JAMES C. ROGERS, as H. W. ROGERS & BROTHER, *Petitioners,*

vs.

THE CHICAGO TITLE & TRUST COMPANY, Trustee of ALEXANDER RODGERS, bankrupt, THE NATIONAL STORAGE COMPANY, JAMES A. PATTEN, FRANK E. WINANS, and E. W. BAILEY & COMPANY, *Respondents.*

CERTIORARI.

To Messrs. Henry S. Robbins and Wallace Heckman,
Counsel for Petitioners above named.

PLEASE TAKE NOTICE, that on the calling up of motion in cause of *Union Trust Company and Security Warehousing Company* v. *Henry L. Wilson, Trustee in Bankruptcy of Harry L. Flanders,* to set the same for hearing with or following this case, No. 139, these respondents will present in case No. 139 their objections and suggestions, copies of the same being herewith served upon you.

JOSEPH E. PADEN and
NEWTON WYETH,
Counsel for Respondents, The Chicago Title & Trust Company and James A. Patten.

RECEIVED copies of the foregoing notice and objections this ——— day of November, A. D. 1904.

———,

———,
Counsel for Petitioners.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1904.

No. 139.

THE FIRST NATIONAL BANK OF CHICAGO, H. W. ROGERS and JAMES C. ROGERS, as H. W. ROGERS & BROTHER, *Petitioners,*

vs.

THE CHICAGO TITLE & TRUST COMPANY, Trustee of ALEXANDER RODGERS, bankrupt, THE NATIONAL STORAGE COMPANY, JAMES A. PATTEN, FRANK E. WINANS, and E. W. BAILEY & COMPANY, *Respondents.*

CERTIORARI.

Counsel for respondents, The Chicago Title & Trust Company, Trustee, and James A. Patten, having been served with notice of motion by appellants in the case of *Union Trust Company and Security Warehousing Company* v. *Henry L. Wilson, Trustee in Bankruptcy of Harry L. Flanders,* File No. ——, Term No. ——, to advance and set that case for hearing at the same time as, or immediately following, this cause, and that said motion would be presented at the motion hour on November 14, 1904, these respondents desire respectfully but earnestly to object to any postponement of this cause for hearing beyond the time the same would regularly be reached upon call, and to having the time of respondents

for presentation and argument of this case abridged upon the hearing.

And respondents show:

(1) That this case has, for a case arising in bankruptcy, already been long pending, the particular controversy here involved having begun in May, 1901.

(2) Respondents have given notice of motion to quash the writ of certiorari returned in this cause, to be presented at the motion hour the 5th day of December, 1904, and if said motion is granted this cause will not be decided in this court upon the merits.

(3) Respondents conceive this case to be very different in its facts from those in the case proposed to be advanced.

Respectfully submitted.

JOSEPH E. PADEN and
NEWTON WYETH,
Counsel for Respondents, The Chicago Title & Trust Company, Trustee, and James A. Patten.

IN THE

Supreme Court of the United States,

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CERTIORARI.

To Messrs. Henry S. Robbins and Wallace Heckman,
Counsel for Petitioners:

PLEASE TAKE NOTICE, that on Monday, the 5th day of December, A. D. 1904, at twelve o'clock noon, or as soon thereafter as counsel can be heard, at the Court Room in Washington, these respondents will move the court, as per printed motions and suggestions supporting the same, herewith served upon you.

Respectfully,

JOSEPH E. PADEN and
NEWTON WYETH,
Counsel for Respondents, the Chicago Title & Trust Company, Trustee, and James A. Patten.

RECEIVED copies of the foregoing notice, and of motions and suggestions, this ——— day of November, A. D. 1904.

———,

———,
Counsel for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1904.

No. 139.

THE FIRST NATIONAL BANK OF CHICAGO, H. W. ROGERS and JAMES C. ROGERS, as H. W. ROGERS & BROTHER, *Petitioners,*

vs.

THE CHICAGO TITLE & TRUST COMPANY, Trustee of ALEXANDER RODGERS, bankrupt, THE NATIONAL STORAGE COMPANY, JAMES A. PATTEN, FRANK E. WINANS, and E. W. BAILEY & COMPANY, *Respondents.*

CERTIORARI.

Now come the respondents, The Chicago Title & Trust Company, Trustee, and James A. Patten, by Joseph E. Paden and Newton Wyeth, their counsel, and move this Honorable Court to quash the writ of certiorari returned in this cause, and to dismiss the proceedings thereon.

And in the event that said motion to quash is denied or postponed, to the submission and hearing of said cause in course, respondents show to the court that they desire to file, in due course, their briefs and arguments on the merits of the whole case, and to be heard before the court at the submission of the case.

For grounds of the said motion these respondents show:

(1) That the matters involved and determined in the said cause were controversies arising in bankruptcy pro-

ceedings, as distinguished from proceedings in bankruptcy or administrative acts simply, from the judgment or decree in which controversies in the District Court an appeal lay and was taken to the Circuit Court of Appeals; and from the judgment or decree of the latter court, an appeal or writ of error lay for review in this court, and the requisite jurisdictional amounts were involved.

Circuit Court of Appeals Act of March 3, 1891, Sec. 6.

Sec. XXXVI of General Orders in Bankruptcy of the Supreme Court.

Hewit v. *Berlin Machine Works,* 194 U. S., 296.

(2) The writ of certiorari is not used as a writ of error by this court to review the judgment of an inferior court, and where error or appeal lies for review there is no ground for issuing the writ of certiorari unless it be found in the Act of March 3, 1891, establishing the circuit courts of appeals.

American Construction Co. v. *Jacksonville, etc., Ry. Co.,* 148 U. S., 372.

See, also,

Huguley Mfg. Co. v. *Galeton Cotton Mills,* 184 U. S., 290.

Certiorari does not lie where the remedy by appeal or error is available.

In Re Tampa Suburban R. Co., 168 U. S., 583.

See, also,

Fowler v. *Lindsey,* 3 Dall. (U. S.), 411.

Respectfully submitted.

JOSEPH E. PADEN and
NEWTON WYETH,
Counsel for Respondents, Chicago Title & Trust Company, Trustee, and James A. Patten.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1904.

No. 139.

THE FIRST NATIONAL BANK OF CHICAGO, H. W. ROGERS and JAMES C. ROGERS, as H. W. ROGERS & BROTHER, *Petitioners,*

vs.

THE CHICAGO TITLE & TRUST COMPANY, Trustee of ALEXANDER RODGERS, bankrupt, THE NATIONAL STORAGE COMPANY, JAMES A. PATTEN, FRANK E. WINANS, and E. W. BAILEY & COMPANY, *Respondents.*

CERTIORARI.

REPLY BRIEF ON MOTION TO QUASH.

I.

MOTION TO QUASH WRIT OF CERTIORARI IS PROPERLY MADE ON RETURN OF THE WRIT.

That the respondents resisted the issuance of the writ, is immaterial as respects the right to make and have considered upon its merits the present motion, because this motion is independent of, and unlimited by, any proceedings that have taken place prior to the return of the writ. If respondents unsuccessfully resisted the issuance of the

writ (and certainly in no manner consented to such issuance), the right to move to quash after the return is in no degree abridged. In the regular course of pleading and practice, this term of the court, to which the writ was returned, is the first time this motion could be presented.

Likewise, the right to make and have the motion considered is unabridged by the fact that no motion to supersede was presented by respondents.

Respondents could not have made this motion before the year (or any shorter period) expired within which the petitioners might have perfected an appeal.

As to the last suggestion of petitioners under head I of their brief, that the subject of review by *certiorari* or appeal is merely a matter of method, and that if the court should be of opinion that this is not a proper case for *certiorari*, the court might well treat the case as upon appeal, respondents maintain (1) that a *certiorari* cannot be turned into an appeal after the period within which an appeal can be perfected has expired; and (2) that, since the act of March 3, 1891, establishing the circuit courts of appeals, wherein provision for and limitation upon appeals from and writs of error to decrees or judgments in those courts are defined, and providing by way of exception (Section 6) that in any such case as is thereinbefore "made final it shall be competent for the Supreme Court to require by *certiorari* or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court," the course by which review shall or may be obtained is not merely method, but is vital. In other words, the act creating the Circuit Courts of Appeals it-

self sets the bounds to appeals and writs of error from or to those courts and provides opportunity for writs of *certiorari* only where the case is "final" in those courts. Respondent's position upon this subject is further fortified by considering the avowed object of the establishment of the Circuit Courts of Appeals—to relieve the Supreme Court.

See, already cited in respondents' brief to the motion to quash:

American Construction Co. v. *Jacksonville, etc., Ry. Co.*, 148 U. S., 372.

The regular time for making the motion to quash is upon the return of the writ. Such motion is not entertained before the return.

4 Ency. Pl. and Prac., 248.

> "An *allocatur* upon notice would not preclude respondent from moving to quash the writ, upon the ground of irregularity, or upon any ground of a merely dilatory or technical character. But in such case we should require him to take his exceptions upon the return of the writ, or at his earliest opportunity, and not lie by until the cause came on to be heard upon the merits. But where the exception goes to the jurisdiction of the court, or strikes at the remedy, showing that the plaintiff is not entitled to it, or that, upon sound principles of law, the writ ought not to have been allowed, it is never too late, while the matter is *in fieri*, for the court to interpose and quash the writ. Nay, the court may do this, *ex mero motu*, whenever, in the progress of the cause, they discover facts which, if they had been disclosed on the application for the writ, would have induced the court to have refused an *allocatur*."
>
> *Haines* v. *Campion*, 18 N. J. L., 49.

See, also:

The People v. *Common Council of Utica*, 65 Barb., 9 (22).

Ewing v. *Filley et al.*, 43 Pa. St., 384.

So, generally speaking, where the petitioner for the writ had a remedy by appeal, the writ will be quashed, although duly issued.

Farrell v. *Taylor*, 12 Mich., 113.

4 Ency. Pl. & Pr., 238.

II.

THE DECREE IN THE CIRCUIT COURT OF APPEALS BEING REVIEWABLE BY APPEAL OR WRIT OF ERROR IN THIS COURT, CERTIORARI IS NOT PROPER FOR PURPOSE OF REVIEW.

In their objections filed herein to the issuance of the writ of *certiorari*, these respondents set forth the proceedings, orders and facts in this case in the District Court (pp. 2-9), and as shown in the said objections and in the brief of the petitioners now filed in opposition to the motion to quash, the receiver, afterwards trustee, claimed actual possession and title of and in the property involved. The present petitioners, the National Storage Company and other parties, claimed rights and interests in the same property, and claimed that the Storage Company was and had been in the actual possession, and the present petitioners claimed rights in the said property in the way of liens by virtue of certain so-called storage warrants or warehouse receipts, that had been issued by the Storage Company to the bankrupt and by him endorsed to the petitioners prior to the proceedings in bankruptcy. The petitioners and the Storage Company at one time objected

to the jurisdiction of the District Court, without stating any specific grounds for such objection, but at the same time set forth their independent claims in full. After a certain amount of evidence had been taken by the referee on reference to him for the purpose, his report was filed, and the order of the District Court of August 5, 1901, was entered. In said order the court recited that it had jurisdiction and possession of the property, and "it further appearing to the court, on the advice of counsel of the parties hereto in court, that now is the best and most advantageous time to sell the seed in question, all parties being in open court, and on the stipulation of" attorney for the petitioner, First National Bank, made in open court, the court ordered sale of the property, proceeds to be subject to the further order of the court. (Rec., 55.)

From this order of August 5, 1901, holding adversely to them as to jurisdiction, the present petitioners did not appeal to the Supreme Court under Section 5 of the Circuit Courts of Appeals Act of 1891, nor to the Court of Appeals, as has been done in several cases; nor did they petition for review under Section 24 of the Bankruptcy Act. After the property was sold and report of sale made to the court, the petitioner, the First National Bank, filed its petition, in which it set forth certain indebtedness due it from the bankrupt and the delivery of the so-called warehouse receipts as security therefor, by virtue of which it claimed an equitable lien (Rec., 70), as afterwards amended on the hearing, a lien (Rec., 114), on the proceeds of sale, and prayed that its claim might be allowed and satisfied and paid out of the moneys on deposit, etc. H. W. Rogers & Bro. also filed their petition, alleging an indebtedness of the bankrupt to them, and the delivery of warehouse receipts as security, and asked a rule on the

trustee to show cause "why an order should not be entered herein directing the payment to your petitioners of the amount of said note, principal and interest, according to the terms thereof, out of the proceeds of the sale of said seed," and prayed for "such other and further or different relief in the premises as the nature of the case may require and as to equity shall seem meet." (Rec., 80-83.) The Storage Company also filed its petition, setting up its claim to possession, control and asking relief (Rec., 100). All of these parties sought the jurisdiction of the court, praying affirmative relief. One Frank E. Winans, who had also filed answers to the receiver's petition early in the proceedings, claiming a carload of seed belonging to him as owner (Rec., 7, 22), also filed his answer to the petitions of the bank and Rogers & Bro., again setting up his claim to a carload of seed (Rec., 97).

Neither the petitioners nor the Storage Company filed their claims for allowance as debts or claims, under Section 57 of the Bankruptcy Act, and the final decree entered in the case was entered upon the petitions of these parties, as well as upon the petitions theretofore filed.

So we may disregard the petitions filed prior to the determination by the District Court August 5, 1901, holding that it had jurisdiction and possession of the *res*, and take the controversies made by the petitioners here, who filed their claims for liens and preferences upon the proceeds of the sale. The petitioners thus sought, on the same allegations that they had set up in their several answers to the petition of the receiver, to be paid their alleged liens and claims and preferences, the same as they had before sought to have the property surrendered to them. They thus positively invoked the full exercise of the jurisdiction of the court.

Under certain circumstances, the litigation would have fallen in the state courts, but the character of the controversy is not altered by the simple fact that the proceedings continued in the District Court.

Considering the whole record, we conceive the case of *Hewit* v. *Berlin Machine Works,* 194 U. S., 296, to be in point for the present case. See, also:

Jaquith v. *Rowley,* 188 U. S., 620.

The consent necessary is to the tribunal, and not to the form of procedure. And in the District Court, the petitioners do not state whether they objected to the tribunal or to the form. So where a party appears and maintains the *bona fides* of the transfer, on a full hearing, answers on the merits and the like, he will be held to have consented.

In re Steurer, 104 Fed., 976.
Bryan v. *Bernheimer,* 181 U. S., 188.
Hicks v. *Knost,* 178 U. S., 241.
Booneville National Bank v. *Blakey,* 107 Fed., 891.

Consent is not a matter of words, so much as acts, as is well shown in *Booneville National Bank* v. *Blakey, supra.*

In the case of *Louisville Trust Co.* v. *Cominger,* 184 U. S., 18, cited by petitioners, the defendant contested to the end that the District Court was without jurisdiction, asked no affirmative relief, and preserved his rights under that objection. So in the case of *In re Beaudine,* 101 Fed., 574, it would appear that the adverse party, who was ruled to show cause, by way of a demurrer, objected that the court had no jurisdiction, that the rights of the parties could not be determined summarily upon petition,

and that the trustee had no title. Upon the District Court overruling the demurrer and ordering the defendant to answer, it appears that the case was at once taken up by petition for review.

The substance of the argument of petitioners is that "if the claim of the petitioners and the Storage Company were sustained, the court was without jurisdiction to sell, because without possession of the property to be sold. * * * What, in this state of the case, if there had been no sale, would have been the proper action for the District Court to have taken? Clearly an order to return the property to the possession of the adverse claimants." And, the property having been sold, petitioners then ask, "Does this change the situation? Clearly not. The money stood in lieu of the property, and, when the District Court finally decided the possession to be in the adverse claimant, the only order it could properly make was an order returning the money, as it did, to the adverse claimants." (21-22.) This is also the argument of these respondents. August 5, 1901, the court asserted its jurisdiction. Exercising a reasonable discretion, it determined that question in favor of the court, and that decision was never opposed thereafter. The court likewise believed the property in dispute belonged to the trustee, and not to the petitioners, the Storage Company and Winans. This matter, however, the opposing parties concluded to contest further upon the merits. New pleadings were then made, a large amount of evidence taken and the final hearing and decree followed upon all the facts. The court, with jurisdiction and consent of litigants to a full trial, under its view of the facts as to the rights of the parties in and to the property, ordered the property returned to the petitioners and the National

Storage Company, and decided against Winans and the trustee.

The important inquiry then arose to these respondents: Was the District Court mistaken in its conclusion on the facts? The respondents had participated with these petitioners and other adverse parties in the taking of a large amount of testimony as to what the ultimate facts were, and when the court found the facts different from what, in their judgment, the evidence warranted, they sought and obtained an appeal, and secured in the Court of Appeals a reversal of the decree of the District Court. When a decree should be entered in the District Court, in accord with such decree of reversal, it would determine a finding on the facts the reverse of that entered in the District Court from which the appeal had been taken; then, in such state of the case, there would be a determination that the trustee and not the adverse claimants had had possession of and title to the property; and, further, the petitioners having consented to the jurisdiction, there would have been, according to the argument of the petitioners, as well as these respondents, a final determination of a controversy in bankruptcy proceedings.

We cannot conceive of a way in which the adverse parties or proposed defendants could more certainly and unequivocally consent to the exercise of jurisdiction by the court than they did in this case, unless they should file an express written consent to be sued, or procure an order to be entered to that effect.

As stated, the final decree in the District Court was decided upon the petitions of the receiver, afterwards trustee, the petitions of the bank, Rogers & Bro., the Storage Company and Frank E. Winans, and upon the answers to the said several petitions and upon report of the

referee, the evidence, etc. (Rec., 114). After directing relief to the petitioners and the Storage Company, the decree dismissed the petition of Winans "and any and all other petitions filed in said cause, claiming any right or lien on any portion of the property described in the foregoing petitions and storage warrants, and not theretofore disposed of." (Rec., 116.)

The force of section 23b of the Bankruptcy Act is that the trustee shall not, by initiative proceedings, compel parties having adverse interests, to litigate in the district court where there are not jurisdictional grounds to sustain the action in that forum, unless the defendants, that is, parties having adverse interests, consent, or unless they voluntarily come into that court and litigate upon the merits, and thereby consent. The petitioners and the storage company and Winans were defendants to the original petition of the receiver, who afterwards was trustee from July 3rd, 1901, and they became cross-complainants by filing in September, 1901, their petitions for affirmative relief after the sale. Under these circumstances, they consented to the jurisdiction and to a full hearing of the controversy.

Hicks v. *Knost*, 178 U. S., 241.
Bardes v. *Bank*, 178 U. S., 522.
In re Steurer, 104 Fed., 976.

As shown in *Mueller* v. *Nugent*, 184 U. S., 1, the proceedings in the District Court, sitting as a court of bankruptcy, may include both a plenary suit and a proceeding in bankruptcy. Of course, so far as the proceeding involves the character of a plenary suit, it is such suit.

It was not necessary for the district court to recite in the final decree that the court had jurisdiction. That had been determined more than a year before. But that

the court exercised jurisdiction and tried a case in the nature of a plenary suit are necessary presumptions, in order that the relief actually granted by the decree may be held to be consistent with the procedings and within the power of the court to enter. Only as the court exercised jurisdiction over a plenary suit, with consent to the tribunal, could it say that it had jurisdiction and grant the relief it did; otherwise it should have declared its want of jurisdiction, and dismissed.

That the property was sold and changed its form, was a mere incident in the course of the case. If, after the sale, petitioners and the storage company intended to question further the jurisdiction, they certainly should have stood unequivocally upon their rights. Instead of doing so, nothing further is ever said as to jurisdiction, no objection is raised, but the petitioners and the storage company file their claims, asking for affirmative relief, setting up the same matters as they had before included in their answers.

District courts, sitting in bankruptcy, have jurisdiction in a proceeding in bankruptcy, wherein adverse interests are presented by parties not theretofore in the proceedings, to determine in the first instance whether the alleged adverse claims of such claimants are colorable or actual. In such matter, the court should proceed in a summary way and not by going into the full merits, or into the merits properly speaking. If, in such summary proceeding, the court finds that the alleged adverse claims are colorable only or not presented in good faith, the court will assert and retain jurisdiction of the property so in its possession. If, on the other hand, the court finds that the adverse claimants have apparent claims, asserted in good faith, then the receiver or trustee should be di-

rected to surrender the property, and the trustee's remedy therefor is by plenary suit in a tribunal having jurisdiction. But if the claimants elect to contest their rights further upon the merits in the district court, after the assertion of jurisdiction in the court, they can consent so to do, and, under section 23 b, waive all question as to jurisdiction.

Mueller v. *Nugent*, 184 U. S., 1.

Louisville Trust Co. v. *Cominger*, 184 U. S., 293.

Jaquith v. *Rowley*, 188 U. S., 620.

Hewit v. *Berlin Machine Works*, 194 U. S., 296.

Petitioners have contended that the proceedings in the district court retained the character of proceedings in bankruptcy because the petitioners made objection, or did not give consent, to the jurisdiction of the court to try a "controversy;" and, as respondents understand, petitioners admit that, with such consent given by them, the proceedings would have taken on the character of such a controversy. The proceedings in the district court certainly took the substantial form of such a controversy, and the court, in its orders and decrees, asserted full jurisdiction. It was competent for petitioners to consent to a real controversy in bankruptcy proceedings. As they submitted, without objection, to an appeal, which raised the whole case, and reviewed it as a controversy or plenary suit, they solemnly admitted that the proceedings in the district court were, what respondents claim they were, and what the Court of Appeals considered them to be,—namely, a plenary suit, tried with consent.

In such state of the record, the decree of reversal in the Circuit court of Appeals would not be final, within the definition of the Act of 1891, establishing the Circuit

Courts of Appeals, but would be reviewable by appeal or writ or error in this Court.

Though all United States Courts, except the Supreme Court, may be and are described as inferior courts, yet the district courts, as courts of bankruptcy, are not inferior courts in the sense that jurisdiction must necessarily appear on the face of the record.

McCormick v. *Sullivant*, 10 Wheat., 199.
Kennedy v. *Bank*, 8 How., 586 (611).

The rule has been strictly adhered to in the United States Courts, that want of jurisdiction is a question that the courts should consider whenever or wherever raised, even if the parties forbear to make it or consent that the case may be heard on its merits. This applies especially where the jurisdiction of the trial court depends upon diversity of citizenship, etc. But where, as by section 23b, parties may consent, this rule cannot apply in its usual strictness. And so, in view of the same section, the rule of the Federal Courts that a party does not waive his formal plea or motion as to want of jurisdiction, by proceeding to a hearing on the merits, does not have its former force in these cases, but the objection to the jurisdiction may be waived.

These respondents carried the case by appeal to the Circuit Court of Appeals and obtained a review on questions of both fact and law. It was competent for the opposite parties to consent that an appealable case should be heard in the district court. We think that the following cases indicate that the appeal was properly heard in the Circuit Court of Appeals:

Elliott v. *Toeppner*, 187 U. S., 327.
Duncan v. *Landis*, 106 Fed., 839.
Booneville National Bank v. *Blakey*, *supra*.

If a case has thus been properly heard in the Court of Appeals on controverted questions of fact and law, by an appeal, as in equity cases, the decision will not be final within the meaning of the Act of 1891, referred to, and if not final is reviewable by appeal or writ of error in the Supreme Court.

In conclusion, respondents maintain that the decision of the Circuit Court of Appeals being reviewable in this court by appeal or writ of error, the writ of *certiorari* should be quashed.

Respectfully submitted,

JOSEPH E. PADEN,
NEWTON WYETH,
Counsel for The Chicago Title and Trust Co., Trustee, and James A. Patten, Respondents.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1904.

No. 139.

THE FIRST NATIONAL BANK OF CHICAGO, H. W. ROGERS and JAMES C. ROGERS, as H. W. ROGERS & BROTHER, *Petitioners,*

vs.

THE CHICAGO TITLE & TRUST COMPANY, Trustee of ALEXANDER RODGERS, Bankrupt, THE NATIONAL STORAGE COMPANY, JAMES A. PATTEN, FRANK E. WINANS, and E. W. BAILEY & COMPANY, *Respondents.*

CERTIORARI.

BRIEF AND ARGUMENT.

The legal questions relating to the appeal from the District Court to the Circuit Court of Appeals have been discussed in the brief and reply brief filed by respondents in support of their motion to quash the writ of *certiorari,* which is to be heard and considered with the hearing upon the merits, and will not be repeated in this brief and argument. The facts of the case are also set forth in substance in the opinion of the Circuit Court of Appeals, made a part of the record herein, and no further allusion will be made thereto, except such as may be necessary in presenting the argument.

BRIEF.

I.

ILLINOIS LAW ABHORS SECRET LIENS. THE LAW AND THE POLICY OF THE DECISIONS OF ILLINOIS, UNDER ITS CHATTEL MORTGAGE LAW AND ITS RULES AS TO PLEDGES, IN ALL CASES OF SECURITY, ARE EXCEEDINGLY STRONG AND POSITIVE.

Murch v. *Wright*, 46 Ill., 487.
Union Trust Co. v. *Trumbull*, 137 Ill., 146.
Borden v. *Croak*, 131 Ill., 68 (74).
Chickering v. *Bastress*, 130 Ill., 206.
Snydaker v. *Blatchley*, 177 Ill., 506.
Elliot v. *Piano Co.*, 80 Ill. App., 51.
Harvey v. *R. I. Locomotive Works*, 93 U. S., 664.
Deering & Co. v. *Washburn*, 141 Ill., 143.
Peoria Mfg. Co. v. *Lyons*, 153 Ill., 435.
Barnet v. *Fergus*, 51 Ill., 352.
Long v. *Cockern*, 128 Ill., 29 (36).
Fifield v. *Farmers Nat'l Bank*, 148 Ill., 163.
Huschle v. *Morris*, 131 Ill., 587.
Kitchell v. *Bratton*, 1 Scam., 300 (303).
Funk v. *Staats*, 24 Ill., 632 (645).
Johnson v. *Halloway*, 82 Ill., 334 (336).
Ticknor v. *McClelland*, 84 Ill., 471.

II.

THE BANKRUPT CONTINUING IN THE ACTUAL POSSESSION OF THE PREMISES AND CARRYING ON HIS BUSINESS THEREIN, AND THE STORAGE COMPANY HAVING NO VALID POSSESSION, THE SO-CALLED RECEIPTS, CALLED WARRANTS OR WAREHOUSE RECEIPTS, ISSUED BY THE STORGE COMPANY, WERE INEFFECTUAL TO TRANSFER PROPERTY LOCATED IN SAID PREMISES.

Union Trust Co. v. *Trumbull, supra.*

Adams, Assignee, v. *Merchants Nat'l Bank,* 2 Fed., 174 (9 Biss., 396).

Geilfus v. *Corrigan,* 95 Wis., 651.

Nash v. *Page,* 80 Ky., 539.

Franklin Nat. Bank v. *Whitehead,* 149 Ind., 560.

Bucher v. *Commonwealth,* 103 Pa. St., 529.

Casey v. *Cavaroc,* 96 U. S., 467.

Ticknor v. *McClelland, supra.*

Canadian Bank v. *McCrea,* 106 Ill., 281.

III.

(a) BY SECTION 67A, WHICH PROVIDES THAT "CLAIMS WHICH FOR WANT OF RECORD OR FOR OTHER REASONS WOULD NOT HAVE BEEN VALID LIENS AS AGAINST THE CLAIMS OF THE CREDITORS OF THE BANKRUPT SHALL NOT BE LIENS AGAINST HIS ESTATE," ALL CLAIMS VOIDABLE FOR LEGAL, IF NOT ACTUAL, FRAUD ARE VOID AGAINST THE TRUSTEE IN BANKRUPTCY.

In re Pekin Plow Co., 112 Fed., 308 (Cir. Ct. Appeals, Eighth Cir.).

Chesapeake Shoe Co. v. *Seldner,* 122 Fed., 593 (Cir. Ct. Appeals, Fourth Cir.).

In re Smith & Shuck, 132 Fed., 301 (Dist. Ct. Nor. D. Io.).

In re Dunn Hardw. & Furniture Co., 132 Fed., 719 (Dist. Ct. E. D. N. Car.).

In re Thorp, 130 Fed., 371 (Dist. Ct. E. D. Va.).

Davis v. *Turner,* 121 Fed., 605 (613), (Cir. Ct. Appeals, Fourth Cir.).

In re Galt, 121 Fed., 443 (Dist. Ct. Nor. Dist., Ill.).

In re Andrea Co., 117 Fed., 561 (Dist. Ct. E. D. Wis.).

In re Fraizer, 117 Fed., 746 (Dist. Ct. W. D. Mo.).

In re Jones, 116 Fed., 431 (Dist. Ct. E. D. N. Car.).

In re Booth, 98 Fed., 975 (Dist. Ct. Or.).

Stroud v. *McDaniel,* 106 Fed., 493 (Cir. Ct. Appeals, Fourth Cir.).

In re Ronk, 111 Fed., 154 (Dist. Ct. Ind.).

In re Leigh, 96 Fed., 806 (Dist. Ct. Col.).

(b) SECTION 70A (5) OF THE PRESENT BANKRUPTCY ACT, "THE TRUSTEE * * * SHALL * * * BE VESTED BY OPERATION OF LAW WITH THE TITLE OF THE BANKRUPT * * * TO ALL * * * PROPERTY WHICH PRIOR TO THE FILING OF THE PETITION HE COULD BY ANY MEANS HAVE TRANSFERRED, OR WHICH MIGHT HAVE BEEN LEVIED UPON AND SOLD UNDER JUDICIAL PROCESS AGAINST HIM," IS NOT SIMPLY A DESCRIPTION OF KINDS OF PROPERTY, BUT IS ALSO A STATEMENT OF THE EXTENT TO WHICH TITLE IS TAKEN BY THE TRUSTEE.

Hewit v. *Berlin Machine Works,* 194 U. S., 296.

In re Pekin Plow Co., *supra.*

Chesapeake Shoe Co. v. *Seldner, supra.*

Ie re Garcewich, 115 Fed., 87 (Cir. Ct. Appeals, Second Cir.).

In re Kellogg, 118 Fed., 1017 (Cir. Ct. Appeals, Second Cir.).

In re Smith & Shuck, *supra.*

In re Tweed, 131 Fed., 355 (Dist. Ct., N. D. Ia., C. D.).

In re Butterick, 131 Fed., 371 (Dist. Ct. M. Dist. Pa.).

In re Carpenter, 125 Fed., 831 (Dist. Ct., West Dist., N. Y.).

In re Rabeneau, 118 Fed., 471 (478), (Dist. Ct. West. D. Mo.).

In re Andrae Co., *supra.*

In re Fraizer, *supra.*

In re Legg, 96 Fed., 326 (Dist. Ct. Conn.).

In re Hull, 115 Fed., 858 (Dist. Ct. Vt.).

(c) BANKRUPTCY PROCEEDINGS, VOLUNTARY OR INVOLUNTARY, ARE IN EFFECT A SUIT BY ALL THE GENERAL CREDITORS OF A BANKRUPT, AND AN EFFECTUAL SEIZURE AND SEQUESTRATION OF THE PROPERTY OF THE BANKRUPT, FOR THE BENEFIT OF SUCH CREDITORS. BY SUCH PROCEEDINGS, THE CREDITORS ARE USING THE COURTS OF LAW AND THEIR PROCESS FOR THE COLLECTION OF THEIR DEBTS.

In re Pekin Plow Co., *supra.*

In re Fraizer, *supra.*

In re Smith & Shuck, *supra.*

Chesapeake Shoe Co. v. *Seldner, supra.*

Adams, Assignee, v. *Merchants National Bank,* 2 Fed., 174 (9 Biss., 396).

(d) THE FOLLOWING CASES CONCERN 67A OR 70A, OR BOTH, AND SHOW THAT THE TRUSTEE STANDS AS ARMED WITH AN EXECUTION.

Spencer v. *Duplan Silk Co., supra.*
Duplan Silk Co. v. *Spencer, supra.*
In re Legg, *supra.*
Fisher v. *Cushman, supra.*

IV.

AN EQUITABLE LIEN, GOOD BETWEEN PARTIES, MUST NEVERTHELESS BE A VALID, SUBSISTING LIEN, TO BE GOOD AGAINST A TRUSTEE. AGREEMENTS FOR MORTGAGES OR PLEDGES, EXECUTORY CONTRACTS TO LIKE EFFECT, PROMISES OF SECURITY OR PLEDGES, AND MERE CONFIDENCES REPOSED BY THE CREDITOR IN THE DEBTOR, LOOKING TO LIENS OR SECURITY, ARE OF NO VALIDITY AGAINST THE GENERAL CREDITORS REPRESENTED BY THE TRUSTEE OF THE BANKRUPT ESTATE. AN EQUITABLE LIEN, TO BE GOOD AGAINST THE TRUSTEE IN BANKRUPTCY, MUST BE ONE THAT WOULD BE GOOD AGAINST AN EXECUTION.

In re Klingaman, 101 Fed. Rep., 691 (So. District of Iowa, E. Div.).

See also:

Casey v. *Cavaroc, supra.*
Story-on Bailments, Sec. 297.
In re Richards, 96 Fed., 937.
Stelling v. *G. W. Jones Lumber Co.*, 116 Fed., 261.

See also:

In re Ronk, *supra.*
Spencer v. *Duplan Silk Co., supra.*
In re Booth, *supra.*
Snydaker v. *Blatchley,* 177 Ill., 506.

V.

IF THE APPEAL WAS TECHNICALLY IMPROPER, THE CIRCUIT COURT OF APPEALS COULD TREAT THE SAME AS A PETITION FOR REVIEW, AND, SO TREATED, THE DECISION RENDERED THEREIN BY THE CIRCUIT COURT OF APPEALS WAS JUSTIFIED AND WAS THE ONLY DECISION THAT COULD PROPERLY BE RENDERED.

In re Richards, 96 Fed., 935 (Seventh Circuit).
In re Abraham, 93 Fed., 767 (Fifth Circuit).
Chesapeake Shoe Co. v. *Seldner,* 122 Fed., 593 (Fourth Circuit).

ARGUMENT.

I.

AS TO THE LAW AND POLICY OF ILLINOIS RELATING TO SECRET LIENS.

The policy of the law of Illinois is decidedly averse to any sort of secret lien, without regard to the form adopted. The sale of goods with the reservation of title in the vendor until the purchase money is paid, a chattel mortgage on a stock of goods which permits the mortgagor to carry on his usual trade as to such stock, the ordinary lease of sewing machines, and transactions of that character, are declared fraudulent *per se* by the laws of that state. The policy of that law is already familiar to this court, as is indicated by its decision in the case of *Hervey* v. *R. I. Locomotive Works,* 93 U. S., 664. In that case this court says:

> "Secret liens, which treat the vendor of personal property, who has delivered possession of it to a purchaser, as the owner until the payment of the purchase money, cannot be maintained in Illinois. They are to be held constructively fraudulent as to creditors. * * * The plaintiff cannot complain, as the laws of Illinois pointed out a way to preserve and protect his lien."

There are only two ways, under the laws of Illinois, in which a valid lien upon personal property may be given; first, by chattel mortgage, properly recorded; second, by pledge, in which the actual and physical possession of the property is delivered to the pledgee, or to

some one for him. The policy of the Illinois law is quite fully discussed in the case of the *Union Trust Company* v. *Trumbull,* 137 Ill., 146. We shall discuss that case in its bearings upon the case at bar a little more fully hereafter, but under the present heading we desire to make two brief quotations.

On page 180 of the opinion we find the following statement:

> "There is no mode under our law, except by chattel mortgage duly acknowledged and recorded, by which the owners of personal property retaining its possession can give another a lien upon it that can be enforced as against creditors and subsequent purchasers."

Again, on page 173 of the opinion we find the following statement:

> "To the existence of a pledge, the possession, either actual or symbolical, by the pledgee, of the personal property which is the subject of the pledge, is absolutely essential. Ordinarily, actual and physical possession of the property is delivered to and retained by the pledgee; but where the actual delivery is to a carrier or warehouseman, and a bill of lading or warehouse receipt is given therefor, the assignment or transfer of such bill of lading, or indorsement of such warehouse receipt, with delivery thereof to the pledgee, is regarded in law as the delivery of possession to the pledgee of the property which the instrument represents, the bill of lading or receipt standing in the place of the property of which it is the symbol. (*Taylor* v. *Turner,* 87 Ill., 296; *Michigan Central Railroad Co.* v. *Phillips et al.,* 60 *id.,* 190; *Burton* v. *Curyea,* 40 *id.,* 320; *Canadian Bank* v. *McCrea et al.,* 106 *id.,* 281.) But it is a necessary condition to the existence of such symbolical possession by the pledgee that the property itself is in the possession of some person or corporation other than the pledgor. Here the endorse-

ments and transfers of the supposed warehouse receipts to the receipt holders were ineffectual to constitute them valid and legal pledges of the wool to secure the debts for which they were hypothecated, and this, both because the National Storage Company did not have possession and control of the wool, and because the wool mentioned in each receipt was not so set apart and distinguished from other wool as that it could have been found and identified by the receipt. The storage company was not, under the law, authorized to issue warehouse receipts."

We also refer the court to the following cases:

Barnet v. *Fergus*, 51 Ill., 352.
Murch v. *Wright*, 46 Ill., 487.
Deering & Co. v. *Washburn*, 141 Ill., 153.
Peoria Mfg. Co. v. *Lyons*, 153 Ill., 435.

The referee, in his report, made this remarkable statement: "The bankrupt desired to borrow money on, or to sell his merchandise. To accomplish it by way of issuing receipts thereon was more convenient than any other way, and, if it was in compliance with the Illinois statute, enabled him by assigning the receipt to transfer the property represented by such receipt. To have taken the seed to some public warehouse and there stored it, and then issued receipts would have been expensive."

The *Union Trust Company* case says that the issuance of warrants under such circumstances is not in compliance with the law. Many creditors and debtors have found it more convenient not to have chattel mortgages recorded, but the law gives little respect to the good faith of such acts. The referee also said, "the storage people were lawfully in possession in the manner herein stated" (that is, they had a so-called lease without delivery of

possession thereunder, and a custodian made occasional trips to the premises, who, according to his story, never discovered that Rodgers was handling the seed under the storage warrants as freely as he handled any seed), "and the bankrupt's possession was subordinate thereto, and not in derogation or opposition to that of the storage people. The bankrupt was there by suffrance, under the storage people." This will not do where there is the relation of debtor and creditor, and never has been allowed. When a mortgagee who does not record his mortgage, permits the mortgagor to continue in possession, the mortgagor may remain in possession at the suffrance of the mortgagee in a certain sense, but in no sense that will aid the mortgage. So as to pledges.

Wherever a security is held to be in the nature of a mortgage, it is to be governed by the rules of law applicable to chattel mortgages.

Borden v. *Croak*, 131 Ill., 68 (74).

Thus conditional sales are held to be within the provisions of the chattel mortgage law, and where there is an instrument not acknowledged and recorded as required by the chattel mortgage act, the same, though valid between the parties, is invalid against judgment creditors and purchasers.

Chickering v. *Bastress*, 130 Ill., 206.
Snydacker v. *Blatchley*, 177 Ill., 506.
Elliott v. *Piano Co.*, 80 Ill. App., 51.

Notice to third parties, whether levying executions or attachments, or purchasing, is immaterial. In Illinois a third party against whom an incomplete chattel mortgage is not good may be a purchaser with full notice of all equities, and he may buy for a past consideration.

Long v. *Cockern*, 128 Ill., 29 (36).

The policy of Illinois law is effective and positive against all secret liens, which are held fraudulent in law, though there may be no fraud in fact.

Fifield v. *Farmers National Bank,* 148 Ill., 163.
Chickering v *Bastress, supra.*

This policy of the law and decisions of Illionis courts against secret liens would be effectually destroyed, if an arrangement such as that which was carried out between the bankrupt and the storage company is sufficient to enable a debtor to pledge his property as security. The chattel mortgage law and its strength is gone, and the rule that possession is the essence of a pledge is a fiction, if parties, desiring to reserve liens in conditional sales, or sales on the installment plan, or to give security upon property in their own homes or in their own places of business, may accomplish such end simply by giving a formal lease of their premises or a portion thereof to a so-called storage company, and then having the storage company issue a so-called warrant and place a tag on the property.

The case of *Union Trust Co.* v. *Trumbull,* 137 Ill., 146, decides that the lien claimed in that case under the storage company warrants would have been invalid against execution or attachment creditors.

There is in Illinois a line of well recognized authority holding that where mortgagor (or pledgor) is permitted to hold and sell in the course of trade, by the consent, express or implied, of the mortgagor, the mortgage or security is fraudulent as against third parties; and such fraud is held to be fraud in law or fraud *per se.*

Huschle v. *Morris,* 131 Ill., 587.
Chickering v. *Bastress,* 130 Ill., 206.

Fraud in law or fraud *per se* is not rebuttable in Illinois.

Kitchell v. *Bratton*, 1 Scam., 300 (303).
Funk v. *Staats*, 24 Ill, 632 (645)
Johnson v. *Halloway*, 82 Ill., 334 (336).
Ticknor v. *McClelland*, 84 Ill., 471.

II.

THE SO-CALLED WAREHOUSE RECEIPTS OR STORAGE WARRANTS WERE INEFFECTUAL TO TRANSFER PROPERTY.

Union Trust Co. v. *Trumbull*, 137 Ill., 146.
Adams, Assignee v. *Merchants National Bank*, 2 Fed., 174 (9 Biss., 396).

The storage company, by the terms of its charter, could issue warrants only on property "deposited or intended to be deposited with said corporation," and when such property and merchandise "have been received, are on the premises or under the control of the said corporation at the time of issuing such receipts." Moreover, the Constitution of Illinois, and the sections of the statute relating to warehouses, plainly contemplate that such storage shall be carried on only by a person or company that has a warehouse in fact, and stores the property in fact; that has the property under its actual control and in its actual possession; and that carries on the storage business for a compensation.

Constitution, Art. 13, Sec. 1, Statutes, Ch. 114, Secs. 2, 3, 9.

It is only such warehouse receipts, made in compliance with law, that are made negotiable.

Statutes, Ch., 114, Sec. 24.

The so-called lease from the bankrupt to the storage company was ineffectual for the above purposes.

Union Trust Co. v. *Trumbull, supra.*

The law also contemplates a real transaction in the storage business, for which the storage company is to receive a compensation for storage as such. The property remained in the premises of the bankrupt under his own possession and control. The warrants were formal affairs, made upon alleged inspection by a so-called inspector of the storage company by occasional trips to the warehouse of the bankrupt, the bankrupt always retaining the keys of said premises. The bankrupt, under said circumstances, in reality paid, not for storage, but only for issuance of warrants, which is not the payment of storage, nor the issuance of warrants under the law.

The National Storage Company, not having complied with the law as to having a warehouse where the seed was located, issued no warrants for said seed in compliance with the law. The so-called lease was ineffectual to give validity to the warrants.

Union Trust Co. v. *Trumbull, supra.*

The transactions and dealings between the bankrupt and the storage company were such as show that both the storage company and the bankrupt never intended or expected the company to take actual possession and to do an actual storage business in the premises.

Bouvier's Law Dictionary defines a warehouseman as "a person who receives goods and merchandise to be stored in his warehouse for hire," and it defines warehouse receipts as "receipts given by a warehouseman for chattels placed in his possession for storage purposes."

Anderson's Law Dictionary defines a warehouseman to

be "a person whose business is to receive and store merchandise for a compensation; a public warehouseman assumes an obligation to the entire public." And with reference to receipts, it says "if a receipt is a warehouse receipt, it is negotiable, but unless it is in fact such, no form can make it such."

What is a warehouseman, and what is a warehouse receipt and its legal effect, are so well defined and known in their legal and commercial significance that any discussion and extended citation of authority appears to be uncalled for. The warehouseman must be engaged in the *business* of warehousing, he must have his warehouse or place under his own control where he stores goods, and he must engage in the business for a compensation. A certain degree of *publicity* in the business is required in order that the storage receipt may have in law power to represent symbolically the property. Without this degree of actual business and publicity, the mere form of a receipt has no more force than any formal papers of the same character made out and passed between persons making no pretense to warehousing.

And as showing that such warehouseman must openly engage in a business of warehousing, and for a compensation as such, see:

Geilfus v. *Corrigan*, 95 Wis., 651.
Nash v. *Page*, 80 Ky., 539.
Franklin Nat. Bank v. *Whitehead*, 149 Ind., 560.
Bucher v. *Commonwealth*, 103 Pa. St., 529.
Adams, Assignee, v. *Merchants' Nat. Bank*, *supra*.

As stated by Anderson, quoted above, the warehouse receipt must be one in fact in order to render it negotiable. The facts that exist are what give force to the receipts, and the want of proper facts equally destroys such force in the receipts. The difference between actual warehousing and that kind attempted to be carried on by the National Storage Company is, that one is warehousing and the other is not. The storage company had no warehouse of its own, and the paper lease, did not give it any possession. It had no keys, but the bankrupt always had and kept the keys, and access to the premises was obtainable only through him. The few signs placed upon the inner walls of the building were obscured by dust and were not readily observable because of the piles of seed upon the floors. These piles were in car-lots, consisting of about 250 bags each, and were from six to seven feet high. It does not appear that the storage company and Rodgers, the bankrupt, ever intended that there should be a real storage or warehouse business done by the company. The "proposal for warehousing," signed by Rodgers with the storage company, and pursuant to which he made arrangements for what was done, and gave the lease, itself appears to assume that the main thing to be done by the storage company was to issue storage warrants. The language is "the National Storage Company hereby proposes to issue its storage warrants to the order of yourself or to such order as the acceptor hereof may hereafter direct, upon personal property * * * to be stored in the premises," etc. And "all of the above-named premises, or such portions thereof as may from time to time be required shall, as and when required, be leased to the National Storage Company." The full understanding was that Rogers was to

retain possession of his premises. The rates of storage were not to be commensurate with the bulk and size of the property and the expenses of handling and keeping, but were simply a percentage upon the value. "All traveling expenses and other incidental expenditures incurred while conducting the business under this proposal and all costs of placing property in store," etc., were to be added to the charges, but all handling of the property, placing it in store, and taking it out, was to be done by Rodgers. (Rec., 128.)

The lease was made for a nominal consideration of "a yearly rental of one dollar and other good and valuable consideration, the receipt of which, in advance, is hereby acknowledged." (Rec., 132.)

The warrants themselves recited that "it is agreed that this company is not responsible for loss or damage to property occasioned by fire, water, leakage, vermin, ratage, shrinkage, accidental or providential causes," etc. (Rec., 155.) In a word, by the various arrangements between the parties, no warehousing was ever intended to be done. Simply a form was to be gone through.

The petitioners claim that this is a warehousing business that has grown up by the commercial necessities of the times. But Rodgers did not have any need of storage. He had his own premises. He had all the room there was that the storage company expected to have. He did not need storage for the care of his seed and property, nor for the purposes of delivering the same, for he had all such storage room he desired and he had all facilities for delivery. Run down to its basis, it is found that the only thing wanted was to avoid the notoriety, or injury to credit, that would arise from complying with the law of the state in giving lawful

security upon his property for advances. He did not wish to surrender the possession of his property, nor did he wish to file chattel mortgages. This was the sole motive of the whole arrangement. Instead of being called a storage business or a warehouse business, the scheme, having no legal or legitimate feature to it, may far better be termed a bureau for the creation of collaterals for the use of debtors.

As to the authorities cited by the petitioners, to show that property may be delivered by storage warrants under any circumstances approaching those that we find in the instant case, it may be said in general that they fall under two classes. First, cases where, though there may have been some lease, force and effect was given to the transaction by the fact that an actual agent or custodian took full or sufficient and exclusive possession of the property or premises, such as to render the transfer good; and second, where pledges were upheld, it was because of a like possession taken on behalf of the storage company. This will be found true of all of the cases cited. In a few instances, particular laws of the state where the property was situated controlled.

Thus in the case of *Hatch* v. *Oil Co.*, 100 U. S., 124, there was actual delivery of the property. In *Sumner* v. *Hamlet*, 12 Pick., 76, a special agent took such possession and control of the property as to answer for all purposes. In the *Bank of Rome* v. *Haselton*, 83 Tenn., 216, the party who issued the warehouse receipt was a regular warehouseman, which tended to simplify the case. He had a warehouse of his own, but lacking room, leased the warehouse belonging to the Iron Company, and it fairly appears from the record of the case that he was the sole and exclusive occupant. His possession was not

concealed, his clerk carried the key, and he appeared to have the control of the property.

The case of *Fidelity Co.* v. *Roanoke Iron Co.*, 81 Fed., 439, was not a case of warehousing or warehouse receipts, but of a pledge of ponderous property located in an open yard upon which was placed a conspicuous sign indicating that it was a yard of the pledgee. There may be cases where pig iron and heavy property, that is almost as immovable as a mountain, may without question be delivered by being pointed out, and certainly where it is stored and set apart and marked, but such cases are a clear exception to all others. The law is much more liberal as to the constructive delivery of bulky property than as to property which may easily be moved. But the rule is against relaxation.

The bankrupt continued in full possession and control of his property. The storage company did not intend to take any possession. It did nothing in that way. The flying trips made once or twice a week or when there was occasion by the so-called inspector of the storage company amount to nothing. The lease amounts to nothing in the way of delivery of the possession, any more than it did in the *Union Trust Company* case, *supra*. Here, as there, as said by the court, the lease was probably only to enable the storage company to say it had a warehouse, but the court said that it had none. The placing of tags on the piles of seed the bankrupt was shipping out and delivering to various parties in the country was nothing. These tags were small affairs and not different in outward appearance from ordinary tags used in the ordinary course of business, and other tags were on the bags. The bankrupt frequently sold seed and shipped it to different parts of the country and substituted other piles

of seed in its place. All these piles were in car-load lots of 250 bags each, piled on the wide open floors about 60 x 100 feet in size, in the six-story and basement building used by the bankrupt.

The storage company permitted Rodgers to exercise the same authority and control over the property, that he did before the receipts were issued. On this point the testimony of Mr. Rodgers is uncontroverted. After discussing his premises and his method of handling and selling seed, etc., he stated as follows (Rec., 216):

> "I have used those premises all the time in the way that I have described, ever since I have been there. Have used the premises since August 1, 1900 (date of storage company's lease), in just the same way. There has been no change whatever in the way I handled it. I used the premises just the same all the time since I have had them."

The alleged possession of the storage company was a fiction pure and simple. In the language of the opinion of the Court of Appeals, the bankrupt

> "remained in possession of the premises as before the agreement, continuing to transact his business there as he had formerly done. There were certain signs placed upon the different floors of the building, indicating that the storage company controlled the premises. These were small and obscure signs, not likely to attract attention, and most of them hidden behind the piles of bags of seed. No sign was displayed upon the exterior of the building indicating any proprietorship of the storage company, or giving notice to the world that any other than the bankrupt had possession and control. There was no open, notorious manifestation of a change of possession, none was intended, and there was none in fact. Upon each pile of bags of seed for which the warehouse receipts or warrants were issued, there was placed a small tag, which might be discovered upon careful search. The bankrupt substantially treated the

> property as his own; at times going through the forms prescribed by the storage company; and whenever he found it necessary, ignoring them."

The process by which the referee reached his conclusion, is fully set forth in the report which the District Court approved in its decree. In this report (Rec., 31) he says: (Italics ours.)

> "Upon the execution of the lease, the National Storage Company proceeded to take possession of the premises leased by it from the bankrupt *by tacking on the walls of the several floors notices, each being made of enameled tin, about three by seven inches in size, with white letters on dark blue ground, said signs being eight in number, and distributed on the several floors and containing the following: 'This property controlled by the National Storage Company, as public warehouse, warehouse premises No. 281.' Said signs were placed some seven or eight feet from the floor on the side of the building and on the partitions between the premises in question and the electric company. No signs were placed on the outside of the building.*"

Then, after referring to the small card signs, four by six inches in size, placed on the different lots of bags, the referee concludes (Rec., 41):

> "I think the lease made by it (the storage company) by the bankrupt, and the possession thereunder, *as herein set forth*, was sufficient for the purpose of accomplishing the end desired, namely, to be sufficient to entitle the storage company to the possession of the premises, and its possession was thereby sufficient to entitle it to issue receipts on property placed in its custody."

The very life and essence of a pledge being delivery to and possession in the pledgee, and the chattel mortgage act of Illinois (Chapter 95, Section 1), providing only one method where the possession may

be retained by the debtor in the case of a chattel mortgage or conveyance *"having the effect* of a mortgage *or lien,"* and that method being that an instrument must be made, acknowledged and recorded, wherein is an express provision that the grantor retains possession, and that without such provision, acknowledgment and recording, the conveyance shall not be valid "unless possession thereof be delivered to and remain with the grantee"—all this being true, whenever an arrangement runs counter to the policy of the chattel mortgage law, and the kindred rules as to the pledges, it will be invalid as against third persons, whether the arrangement is sufficient to be called a chattel mortgage or not. No symbolical delivery will be sufficient in cases of security, in Illinois, at least, where the control of the personal property continues with the debtor, no matter how bulky the property or how great the inconvenience of removal. No debtor can be constituted the agent or bailee of the secured party, to hold the property. Herein is the distinction from sales, where the vendor may, under proper conditions, be bailee of the vendee.

In this connection we desire to make a somewhat lengthy quotation from the opinion of this court in the case of *Casey, Receiver,* v. *Cavaroc et al.,* 96 U. S., 467:

> "Dalloz says: 'It is evident that if the pledge of movables could, without a delivery, have effect in regard to third persons, it would be the source of great frauds and deceptions. When the debtor is obliged to surrender possession, he cannot deceive third parties dealing with him by keeping possession of the pledged articles as part of his estate, and getting credit thereby.' He takes special notice of the decision that a pledge is not valid if the dispossession of the debtor is not sufficiently complete to prevent substitution; or if there is a mere contract

for a pledge, and not an actual pledge." * * *

"The Credit Mobilier claims a privilege by virtue of a pledge; and such a privilege, as we have seen, cannot be maintained as to third persons, without possession. Bad faith, it is true, would defeat the pledge, though the creditor had possession. But want of possession is equally fatal, though the parties may have acted in good faith. Both are necessary to constitute a good pledge so as to raise a privilege against third persons. The requirement of possession is an inexorable rule of law, adopted to prevent fraud and deception; for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods.

"This consideration meets the objection which is urged against the rule, that it would result in giving to the general creditors the benefit of the advances made to the debtor on the faith of the stipulated pledge, inasmuch as the estate is increased to the extent of these advances. It is true that the estate is so increased; but the debts and liabilities are also increased to the same amount by the demand of the party who makes the advances; the only effect of the rule being, that the latter comes into concurrence with the other creditors on an equality, and not by way of preference; and if the latter derive any benefit from this result, it must be remembered that, in view of the law, they might not have given credit to the common debtor had he not remained in possession of the goods, and appeared to continue as the absolute owner thereof. If the pledge should be sustained, they would have good cause to complain that they had been deceived by the acts of the parties setting up the pledge. So that, on the question of relative merit and demerit, the parties are in all respects equal. It is on this principle that the law is founded."

The case of *Canadian Bank of Commerce* v. *McCrea*, 106 Ill., 281, expressly holds that a warehouse receipt issued in accordance with the Statutes of Illinois is not a negotiable instrument in the sense that bills of ex-

change and promissory notes are negotiable, and the court in that case quotes fully from the opinion of this court in *Shaw* v. *Railroad Co.*, 101 U. S., 557. It further holds, in substance, that the possession of the receipt is no more than evidence of the possession of the property itself. If, therefore, by the greatest latitude, it should be held that the receipt holders in this case at any time ever had the possession of the property by virtue of these receipts, the fact, that the bankrupt thereafter, and at the time of the failure, with their knowledge, or without their knowledge, had to the rest of the world apparent possession, and had power to make substitutions, would defeat their title.

III.

THE PROTECTION OF GENERAL CREDITORS UNDER THE PRESENT BANKRUPTCY ACT.

By section 67a of the present Bankruptcy Act, which provides that "claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate," all claims voidable for legal, if not for actual, fraud against creditors of the bankrupt are void against his estate. By record, such notice is given as to certain claims that they are rendered valid against creditors. The words "for other reasons" refer to similar matters such as want of possession in the case of a pledge, or in the case of a chattel mortgage unrecorded, or in the case of conditional sales—such as fail to accomplish the end, notice. The words may refer also to actual fraud, but they certainly must include reasons which make what is done fall short of accomplishing

the same end that record would accomplish. Other paragraphs of section 67 provide for the subrogation of the trustee to the rights of a creditor who has some judgment or other lien which he is prevented from enforcing by reason of the bankruptcy proceedings, for the dissolution of liens created or obtained within four months in any suit, etc., for the setting aside of conveyances, etc., made with intent of fraud upon the bankruptcy act or upon creditors, and for the preservation of liens made in good faith for a present consideration, which have been recorded according to law if record was necessary in order to impart notice.

But, in view of all these other provisions, the general meaning above urged for 67a is necessary in order to render 67a of any force.

At one time, certain District Courts gave a narrower interpretation to 67a, substantially holding that only claims which some creditor could set aside, by virtue of legal process actually existing and the like, or for actual fraud, could be avoided by the trustee; but this view wholly did away with all force to 67a, for those matters were provided for in other paragraphs and sections of the act.

Section 70a (5) of the present Bankruptcy Act, which provides that the "trustee * * * shall * * * be vested by operation of law with the title of the bankrupt * * * to all * * * property, which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon or sold under judicial process under him," is not only a description of kinds of property, but a statement of the *extent* to which title in all kinds of property is taken by the trustee. The language used is entirely different from a mere description.

If an enumeration of kinds of property was meant, the language would be descriptive or in the form of enumeration, as "property real and personal, choses in action, debts, demands," etc., as was used in prior acts. This view gives force and effect to section 70a(5) that is commensurate with and consistent with 67a. The spirit of the law is found in the letter of the law. That which the bankrupt has and can convey, that title he has to pass to his trustee. To the extent his title can be seized or sold by judicial process against him, to that extent he has interest and title. It is his title before the world that is to be taken and used for the benefit of all creditors upon the institution of bankruptcy proceedings, which proceedings abruptly terminate all control of the bankrupt over his property and all his business. The title which innocent purchasers, or, in Illinois, purchasers in fact, or execution or attachment creditors could have obtained from him is the title that passes to the trustee and there can be no question but that under the law of Illinois, that means a title divested of any sort of secret lien.

By force of sections 67 and 70, as well as by consistent provisions elsewhere in the bankruptcy act, bankruptcy proceedings, voluntary or involuntary, are in effect a suit by all the general creditors of the bankrupt and an effectual seizure and sequestration of the property of the bankrupt for the benefit of such creditors. By such proceedings, the creditors are using the courts of law and their process for the collection of their debts.

It is pointed out in numerous decisions that 67a and 70a(5), as well as a number of other paragraphs, were not found in the bankruptcy act of 1867, nor in any prior acts. Congress certainly manifested an intention by all of these provisions to take a positive step in ad-

vance of that afforded in the older bankruptcy acts in the direction of protecting general creditors. In a few decisions of the courts these provisions appear to be without much force, and questionable liens, and liens that fail because they do not comply with the law and amount to legal liens, are said to prevail as much under the present acts as under the old acts of bankruptcy. According to such decisions, congress introduced a great many changes in the present act without accomplishing anything.

These narrower views, such as *In re Howland*, 109 Fed., 869, *In re Elmira Steel Co.*, 109 Fed., 156 as well as *In re N. Y. Economical Printing Co.*, 110 Fed., 514, in some of its aspects, are cleared away by such decisions as *In re Garcewich*, 115 Fed., 87, of the Circuit Court of Appeals, Second Circuit, which cites the *N. Y. Economical Printing Co.* case and other cases, and brings out clearly a better and more necessary construction of the sections. There are many other cases, such as *In re Pekin Plow Co.*, 112 Fed., 308, Circuit Court of Appeals, Eighth Circuit, and a great number of District Court cases that maintain the same view.

In the case of *In re* Pekin Plow Co., *supra*, in the Circuit Court of Appeals, Eighth Circuit, the court, referring to Sections 67 and 70 of the Bankruptcy Act, says:

> "These and many other provisions of the act evince an unquestionable intent on the part of Congress to make all creditors of the bankrupt parties to the proceedings when once instituted. The effect of the institution of such proceedings is to forthwith sequester and appropriate all the property of the bankrupt to the payment of his debts *pro rata* and equally."
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> * * * * *
>
> "From the foregoing provisions of the act, it, in

our opinion, clearly appears that the institution of the proceedings in bankruptcy amounts to an effectual sequestration for the benefit of all his creditors of all the property of the bankrupt, including property transferred by the bankrupt, before proceedings were instituted, in fraud of its creditors. By such a proceeding, the creditors are 'using the courts of law and their processes for the collection of their debts,' and the creditors thereby make an effectual seizure of the property of the bankrupt within the true meaning of the decisions of the Supreme Court of Nebraska hereinbefore referred to."

In the case of *Chesapeake Shoe Co.* v. *Seldner, supra,* the Circuit Court of Appeals for the Fourth Circuit says:

"If the 'title of the bankrupt,' in Section 70a, means title as between him and a consignor or vendor, this section of the act is not only utterly inconsistent with the entire spirit of the law, but the numerous decisions holding that the trustee in bankruptcy takes title to property sold to the bankrupt under unrecorded conditional contracts of sale must be held erroneous. The registry statutes of the states do not invalidate the title of the vendor by such a contract as between him and his vendee, but only as between the vendor and the creditors of the vendee. Quite aside from the violence done to the plain meaning of the words, 'title of the bankrupt * * * to property * * * which might have been levied upon and sold under judicial process against him,' Clause 4 of Section 70a would seem to make an end of the contention here set up. The trustee takes 'the title of the bankrupt * * * to * * * property transferred by him in fraud of his creditors.' If the words, 'title of the bankrupt,' do not mean title as between him and his creditors, the language above quoted is meaningless. As between the bankrupt and his fraudulent grantee, the bankrupt has no title (*Spencer* v. *Duplan Co.* (D. C.), 112 Fed., 638), and to give any effect, or even meaning, to Clause 4, we must construe the words 'title of the bankrupt' as meaning title as between the bankrupt and his creditors."

The interpretation and force given to the above provisions of the Bankruptcy Act is abundantly supported by the decisions in other Circuit Courts of Appeal as well as a large number of the District Courts in the cases cited by us under head III of the brief above.

Congress, by the present bankruptcy act, undertook to give general creditors a process of the courts into their hands through the trustee, that should enable them to enforce all their rights, *pro rata*, that they would have been at liberty to enforce by execution had bankruptcy proceedings not intervened. Hence, where parties would have had valid legal liens, had they complied with the law as to record or as to possession of property pledged and the like, for failure of such record or possession they are now cut off from such liens by the provisions of the present act. Indeed, in the Sixth Circuit, now the Seventh, under the old act of 1867, the adjudication of bankruptcy was equivalent to a judgment and a levy, and the assignee had the right of a judgment creditor in cases where a mortgage or a pledge was invalid in consequence of wanting any element requisite under the law or statute of the state.

Adams, Assignee v. *Merchants' National Bank*, 2 Fed., 174.

The petitioners, in their brief and argument, manifest some apprehension lest Congress should rest under some imputation of wrong in attempting to cut off "*bona fide* holders for value and without notice." If Congress has failed to accomplish anything by 67a and the unusual language of 70a (5), substantially different from the old law of 1867, it might well expect criticism. As well might we say that the same imputation of wrong should rest upon a legislature in providing that an execution

should cut off imperfect liens or the constructively fraudulent claims of other creditors of the judgment debtor, as to urge that Congress intended to wrong creditors having no better alleged liens than those that have been presented in the present case.

One may say generally that the trustee takes the title of the bankrupt, and that he takes it in the plight in which it is found. But it is manifest from the provisions of the bankruptcy act we have considered, as supported directly by the great array of authority of the District Courts and the Circuit Courts of Appeals, that the trustee in bankruptcy does not simply step into the shoes of the bankrupt as to his property, but that in important particulars he represents the general creditors; it appears that he is armed with process, as it were, that enables him effectually to enforce the rights of creditors, the same as if those creditors had brought suit, obtained judgment, and placed execution in an officer's hands.

IV.

AN EQUITABLE LIEN, GOOD BETWEEN PARTIES, MUST, NEVERTHELESS, BE A VALID, SUBSISTING LIEN, TO BE GOOD AGAINST A TRUSTEE. AGREEMENTS FOR MORTGAGES OR PLEDGES, EXECUTORY CONTRACTS, TO LIKE EFFECT, PROMISES OF SECURITY OR PLEDGES, AND MERE CONFIDENCES REPOSED BY THE CREDITOR IN THE DEBTOR, LOOKING TO LIENS OR SECURITY, ARE OF NO VALIDITY AGAINST THE GENERAL CREDITORS REPRESENTED BY THE TRUSTEE OF THE BANKRUPT ESTATE. AN EQUITABLE LIEN, TO BE GOOD AGAINST THE TRUSTEE IN BANKRUPTCY, MUST BE ONE THAT WOULD BE GOOD AGAINST AN EXECUTION.

In re Ronk, *Spencer* v. *Duplan Silk Co., in re* Booth, *Savin* v. *Camp, supra.*

In re Klingaman, 101 Fed. Rep., 691 (So. District of Iowa, E. Div., overrules 1 N. B. N. R., 296)

An equitable lien is a right to subject a particular fund or specific property to the satisfaction of a demand. It is a charge with respect to defined property; but it is not a present estate or interest in the property, nor a present subsisting lien upon it. It is neither a *jus in re* nor a *jus ad rem.* An action is required to make it such. It is in reality but a right of action to gain such interest.

Fetter on Equity, p. 227.

3 Pomeroy Eq. Jur., 1233, etc.

As before shown, such equitable liens are not recognized in Illinois as against the rights of execution or attachment creditors, or purchasers, with or without notice, prior to action brought to establish the lien.

Chattel mortgages defectively executed or unrecorded are good between the parties thereto at law. A promised chattel mortgage, left unexecuted, imperfect pledges unperfected for want of delivery of the property, and conditional sales of personalty, reserving security for unpaid purchase price, are good between the parties in equity. But, all such are executory as to third parties, and fall both at law and in equity.

In all such cases, the maxim, that "equity regards that as done which ought to have been done," only supports the action when brought, and not before; else such equitable liens would be reared into legal ones, as from the beginning.

It is not the intention of the bankruptcy act, that, after proceedings in bankruptcy have been instituted, parties shall then take steps, either by action in courts or by taking possession of property or by recording unrecorded instruments, to perfect what would, up to that time, fail to be valid liens against creditors. Any so-called lien, which requires any such steps to be taken or any such act to be done, is not a lien of a character to be enforced in Illinois in bankruptcy proceedings. If there be an equitable lien upon equitable property or rights, it might be good against the trustee and good against an execution in some states; but under the law of Illinois, as repeatedly declared by its highest court, it is beyond controversy that conditional sales, unrecorded chattel mortgages, attempted pledges where there has been no delivery, are constructively fraudulent against creditors, and if a creditor can obtain a judgment and levy an execution or levy an attachment, or buy the property, however much notice he may have, he will cut off such claims. So, under the bankruptcy act, to allow parties to perfect their liens in such cases, by taking possession of undelivered property in case of pledges or by recording chattel mortgages, after the bankruptcy proceedings have begun, would be to allow them to obtain their legal liens in spite of the provisions of the bankruptcy act against illegal pretences, and in spite of the law and policy of the state against secret liens and constructive fraud. The trustee, on behalf of the general creditors, is entitled to invoke the law of Illinois to prevent the enforcement of these so-called claims of the petitioners and the storage company; and this is true, whatsoever might have been the rights directly between the petitioners, the storage company and the bankrupt.

But, the obtaining of liens against insolvent debtors through legal proceedings within four months of the bankruptcy, is to be deemed null and void, under the bankrupt act.

And the allowance now in the bankruptcy proceedings of such claims as require action in courts to create them liens would be for the bankrupt court in effect to give and support illegal preferences. Such alleged equitable claims must fall under such circumstances.

In re Richards, 96 Fed., 937.

Stelling v. *G. W. Jones Lumber Co.*, 116 Fed., 261.

In re Richards, 96 Fed., 937, and in *Stelling* v. *The G. W. Jones Lumber Co.*, 116 Fed., 261, sustain the contention that transfers, to be effectual, must be present, valid, subsisting transfers, and that the diligence of a creditor who would by legal proceedings perfect and maintain his lien, must have begun action before the bankruptcy proceedings were instituted, and, perhaps, not less than four months before such proceedings.

The First National Bank and H. W. Rogers & Brother received illegal preferences within the meaning of the bankrupt act. The bank received large payments in money. If the payments did not come from the seed in question, or that which had been involved under the warrants held by the bank, they were certainly illegal preferences. When the bankrupt removed a lot of seed, the security was at an end. Thenceforward the creditor had the right to recover a judgment against the bankrupt, but he had no property securing his loan. When subsequently a new warrant was given in place of a warrant for seed that had some time before been removed, it was the giving of a new security and an illegal

preference. This applies to both the bank and Rogers & Brother.

If the act perfecting a lien is independent of the original transaction, so that there is no present consideration, the lien, if created within four months, will fall under the provisions of Section 67. The lien in such cases is not potential from the time of the advance, but only from the changed conditions wrought by action or taking possession, which does not make the lien relate back. Distinction is here to be made with respect to mechanic's liens and the like, where, by the law, the lien is potential and the filing of a subsequent notice within a limited time is only to prevent lapse. But where the right respecting security is only contractual and personal between the parties, having been agreed upon with the loan or credit, but not perfected, it is not a present right *in re* or *ad rem*, and should the debtor refuse to deliver when called upon, nothing remains but for the creditor to bring action to compel performance; and in such cases no lien attaches until decree is obtained or the property is seized by a sufficient legal process, unless the bringing of suit is by the local laws notice of such character as to cut off rights of third parties. The taking of possession under all such cases, or the bringing of suit, creates a preference not allowed by the bankruptcy act, where other conditions specified in the act are found.

It was shown in the evidence in the present case that from under at least five of the thirteen warrants held by the First National Bank the lots of seed were removed, sold and shipped away by the bankrupt, and new lots of seed put in their place by him.

As to the five warrants held by Rogers & Brother, the seed had been substituted in the cases of, at least, three warrants.

There is indication that lots were substituted in a number of other of the eighteen warrants held by the bank and Rogers & Brother.

This portion of the evidence was very hard to produce, and the substitutions hard to trace, but, in the face of every objection and all opposition on the part of the bank, Rogers & Brother, and the storage company, the trustee, succeeded in bringing a good many facts to light. But the petitioners are demanding "equity." In equity and under circumstances such as are involved in this case, it is pointedly said, in the noted *Union Trust Company* case (p. 164), that the burden is on the claimants to make a clean breast of everything touching the transactions and property.

Estoppel does not apply where a certain and definite property is all taken away and other property substituted in its place. If one has a perfectly valid chattel mortgage, duly acknowledged and recorded, covering personal property, definite in description and location, and the mortgagor wrongfully takes the same away and substitutes other like property, estoppel will not protect the mortgagee.

In the case of *Snydaker* v. *Blatchley,* 177 Ill., 506, Blatchley, who was a public warehouseman, stored grain in an elevator of Class B and gave grain receipts to Snydacker. The receipt having in it, as the court said, words of conveyance, the transaction, being for security, was treated as a mortgage. Blatchley failed and assigned under the insolvency law of the state, and Snydacker claimed certain grain in the warehouse. The court said:

> "As between the parties it created a lawful lien [there being a conveyance] upon the grain covered

by the writing. *Whether such an instrument is good and effectual as against the assignee of an insolvent debtor need not be here considered, for the reason it was conclusively proven the wheat in the elevator when the mortgage was executed, and upon which it attached as between the parties, had been removed therefrom and disposed of by the debtor, prior to the assignment, and did not come to the hands of the assignee.* Had appellants held a mortgage acknowledged in strict conformity with the statute, it would have availed them nothing, for the reason the assignee had not the property to which it attached. *The instrument does not profess to operate upon any grain other than that then owned by Blatchley and then in his possession. Equitable interests in property subsequently acquired by a mortgagor are never declared, except where the intent to bind after acquired property is clearly expressed in the mortgage or writing relied upon to create the lien."*

The above portion of the decision is complete in its being one branch of the case before the court; the other portion of the case related to receipts for property which the parties held as owners.

It is difficult to see that there would be any different reasoning in the case of a pledge held as security from that with reference to a chattel mortgage, as stated in the Snydacker case.

Also the fact that the bankrupt in this case in the regular course of business frequently removed and sold certain lots of seed, and at later dates took up the old warrants and gave the bank and Rogers & Brother in exchange therefor new warrants for new lots, militates against the equities claimed. Whether the bank and Rogers & Brother acted in ignorance of the facts, does not relieve the case from running against the provisions of the bankruptcy act as to illegal preferences. And the

effect of protecting the bank and Rogers & Brother by so-called equitable liens and estoppels in this case, would be, in short, to encourage tendencies to fraudulent and questionable methods of business, such as took place in the bankrupt's business in this instance.

It may be that the petitioners here failed, in fact, to have the legal lien that they supposed they had. It is immaterial, under the bankruptcy act, and under the laws of Illinois, whether there was fraud in fact or whether they occupied innocently and the fraud was only fraud in law. If they acted in good faith, there is no question but that the First National Bank and Rogers & Brother, respectively, had their rights of action against the National Storage Company, because of the false warrants. It will appear that they should have no standing in equity, as they maintained by their petitions in the District Court and boldly maintain by their brief and argument in this court that the scheme carried on by the storage company was a legitimate one. They also now claim the scheme was well known to the commercial world and therefore must admit it was well known to them. We deny the existence of this general knowledge, but if petitioners claim it they should be estopped from claiming innocence of the infirmities of the scheme. They maintain that all that the storage company did was right, but undertake, in the same breath, to say to the court that, if the court stamps it as a fraud and a false pretence, then they wish to be protected in equity.

Furthermore, whatever the character of the alleged possession, the petitioners cannot deny actual knowledge of it. They were not in possession themselves. If the alleged possession of the torage company was for the

petitioners, it could be only on the theory that it was the agent of the holders of the so-called warrants, *i. e.*, the petitioners. If it was their agent, its knowledge of the invalidity of the lien and its knowledge of the fact that the actual possession of the seed was in Rogers, and not in itself, was their knowledge.

The Supreme Court, in the *Union Trust Co.* v. *Trumbull* case, in the latter part of the opinion states the real ground and the only ground for its conclusion and decision. It quotes the provision of the Voluntary Assignment Act of Illinois, showing that the assignee under that act takes title purely as a "volunteer" and subject to all the liens, equities and burdens to which it was subject in the hands of the assignor. The court then says:

> "The general rule is that an equitable lien is enforcible against voluntary assignees. * * * There is no mode under our law, except by chattel mortgage, duly acknowledged and recorded, by which the owner of personal property, retaining its possession, can give another a lien upon it that can be enforced against creditors and subsequent purchasers. But by 'creditors' is meant, not general creditors or creditors at large, but only such creditors as are armed with an execution or writ of attachment or other process of court, are regarded as 'creditors' in the sense that they are authorized to impeach a conveyance or transfer of property by their debtors, or question the validity of an equitable lien on personal property that is good as against such debtors themselves, and their heirs, executors, administrators and voluntary assignees."

As before shown, the bankruptcy act includes within its protection the very parties as general creditors that were excluded by this decision. Furthermore, we do not apprehend that it will be contended by any one that the trustee in bankruptcy is a pure volun-

teer. Under the Voluntary Assignment Act of Illinois, the debts of the assignor were not discharged. Under the Bankruptcy Act, they are. Under the Voluntary Assignment Act of Illinois the debtor could not be compelled to make an assignment. Under the Bankruptcy Act, he may be. And we take it that it is well known that most of the voluntary proceedings in bankruptcy are instituted by debtors to forestall involuntary proceedings that may be instituted against them.

V.

IF THE FORMAL APPEAL FROM THE DISTRICT COURT TO THE CIRCUIT COURT OF APPEALS BE TAKEN AS INFORMALLY A PETITION FOR REVIEW, THE DECISION OF THE CIRCUIT COURT OF APPEALS REACHED THEREIN WAS JUST AND PROPER, AND THE ONLY PROPER DECISION TO BE REACHED.

While respondents maintain with confidence that the circumstances of this case class it as an independent suit or a controversy in bankruptcy proceedings, and not as a mere proceeding in bankruptcy, they, nevertheless, present a few suggestions on the subject of petitions for review, and the taking of an appeal as informally a petition for review.

a. The point raised by petitioners is not one as to real jurisdiction, but as to matter of form and practice merely; and the case having been submitted in the Circuit Court of Appeals by all parties without objection, and there determined, petitioners are estopped and can not now present the point of practice.

b. The findings and report of the referee, approved by the District Court in its decree, were a part of the find-

ings of that court and characterized the possesion mentioned in the decree of the court, showing such possession to be no actual possession whatever, and such findings of the referee are a part of the findings certified to the Court of Appeals, and considered by it.

c. In such cases of informal petitions for review, by way of appeal, the Circuit Court of Appeals can consider the whole record, which has been certified up to it, and submitted by the parties without objection, as embodying the facts upon which the law is to be revised, and revise it accordingly.

It is at once obvious that there is no real question of want of jurisdiction raised, or attempted to be raised, by the petitioners, but that the point presented amounts to a mere question of practice. The "want of jurisdiction" alleged is not of that character that requires the proceedings to be dismissed whenever the point is made or noticed; for there is no question, in proceedings of this nature, of the ample jurisdiction of the Circuit Courts of Appeals over the subject-matter of review and revision of the decisions of the District Courts.

If this case in the District Court was a bankruptcy proceeding, from the decree in which a petition for revision, and not an appeal, was the proper method to obtain a review in the Circuit Court of Appeals (if there is such limitation to a petition for revision), yet, the case having been carried to the latter court by an appeal, and that court having full jurisdiction to review bankruptcy proceedings by petition or appeal, and the case having there been submitted by all parties without objection, it must now be concluded that the court itself, as well as the parties, waived all objections to the form in which the jurisdiction of that tribunal was invoked.

The jurisdictional requirement as to due notice set forth in the bankruptcy act having been satisfied in this case under the method pursued in taking the case to the Circuit Court of Appeals, as well as it would have been had the form used been that of a petition for review, and, especially, no objection having been raised at the hearing or before the decree in the Circuit Court of Appeals, the petitioners cannot now be heard to say that the mere matter of form and pleadings used in invoking the jurisdiction of the appellant tribunal was not waived by their thus submitting the case upon its merits to that tribunal, and that the court of appeals did not disregard the matter of form, and review the case as if brought before it by petition.

The very position of petitioners, that the Circuit Court of Appeals had jurisdiction to review had there been a petition for review instead of an appeal, concedes the contention that their objection goes only to the form in which the case came to that court.

Their objection, now made for the first time, being to a matter of form and not of substance, comes too late. They may properly be said to have joined in the errors assigned in the Court of Appeals, and must concede that all points raised were passed upon by the court with jurisdiction.

That the objection is upon a question of practice, and not want of jurisdiction, has the support of a number of the Circuit Courts of Appeals.

In re Richards, 96 Fed., 935 (7th Circuit).

In re Abraham, 93 Fed., 767 (5th Circuit).

Chesapeake Shoe Co. v. *Seldner,* 122 Fed., 593 (4th Circuit), (and see cases there cited).

The District Court in its decree approved and confirmed the *referee's report and findings therein,* except as to jurisdiction. (Rec., 114.) This made that report and the findings therein the findings of the District Court, and the finding in the decree as to the "possession" of the storage company must be taken in connection with and in view of the findings of the referee adopted by the court.

This report is found on pages 29 to 44 of the Record, and is in some of its essentials set out above under head II of this argument. The facts constituting the so-called possession as they actually were are there found, which show absolutely that there was no actual possession or control in the storage company. It is true the referee and the court drew from these findings of fact certain conclusions as to possession, which were mere conclusion of law; but the facts are there *found,* and were certified to the Circuit Court of Appeals, and that court must be taken to have revised the law thereon. The decision rendered by the Court of Appeals is not only justified by the record so limited, but was the only decision that could be reached.

Further, it may be well maintained that *where the whole evidence* that was before the District Court *is certified up* to the Circuit Court of Appeals under the form of an appeal, although only a petition for review would be the proper practice, *and is there submitted* to the court *without objection by the parties,* and especially where there is no conflict of evidence as to the material facts, the Court of Appeals can *revise the law of the whole case,* as on a petition, using the evidence as the statement of facts.

In re Richards, *supra.*

Treated as a petition for review, the decision of the court was just and proper, and is supported by other United States Courts.

Respectfully submitted.

JOSEPH E. PADEN and
NEWTON WYETH,
Counsel for Respondents, Chicago Title and Trust Company, Trustee, and James A. Patten.

REED, SMITH, SHAW & BEAL,
Of Counsel.

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JAMES H. McKENNEY,

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

No. 189.

THE FIRST NATIONAL BANK OF CHICAGO, H. W. ROGERS and JAMES C. ROGERS, as H. W. ROGERS & BROTHER, *Petitioners,*

vs.

THE CHICAGO TITLE & TRUST COMPANY, Trustee of ALEXANDER RODGERS, BANKRUPT, THE NATIONAL STORAGE COMPANY, JAMES A. PATTEN, FRANK E. WINANS, and E. W. BAILEY & COMPANY, *Respondents.*

Certiorari.

Brief of Reed, Smith, Shaw & Beal for Respondents.

JAMES H. REED,
JAMES H. BEAL,
of Counsel for Respondents, the Chicago Title & Trust Company, Trustee, and James A. Patten.

JOSEPH E. PADEN,
NEWTON WYETH,
REED, SMITH, SHAW & BEAL,
of Counsel.

SHAW BROS., PITTSBURGH, PA.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1904.

No. 139.

THE FIRST NATIONAL BANK OF CHICAGO, H. W. ROGERS, and JAMES C. ROGERS, as H. W. ROGERS & BROTHER,
Petitioners,

vs.

THE CHICAGO TITLE & TRUST COMPANY, Trustee of ALEXANDER RODGERS, BANKRUPT, THE NATIONAL STORAGE COMPANY, JAMES A. PATTEN, FRANK E. WINANS, and E. W. BAILEY & COMPANY, *Respondents.*

CERTIORARI.

Brief of Reed, Smith, Shaw & Beal for Respondents.

This brief is supplemental to the Brief and Argument heretofore filed for the Respondents. It is presented because of the importance of the questions involved, not only in this case, but in other litigation pending before the courts of the United States, and it is intended to emphasize, and to some extent elaborate, the arguments upon these propositions, and in the following order:

FIRST. The District Court had jurisdiction.

SECOND. The case was properly heard and disposed of as an appeal in the Circuit Court of Appeals; and in any event, the Petitioners, having raised no objection to the form in which the case was heard by the Circuit Court of Appeals, cannot now question the right of that court so to hear and dispose of the case.

THIRD. The warehouse receipts held by the Petitioners were invalid, and no title to the property in controversy passed by the endorsement thereof.

FOURTH. The warehouse receipts being invalid, and neither the Storage Company nor the Petitioners being in actual possession of the property, there was no valid pledge.

FIFTH. Under the Bankruptcy Act the Petitioners, as against the Trustee, have no claim to, or lien upon, the property purporting to be covered by the warehouse receipts.

I.

THE DISTRICT COURT HAD JURISDICTION.

(a) The Trustee was in the actual possession of the property, the title and right of possession to which the Petitioners claimed was in them, and it acquired that possession from the bankrupt peaceably and without fraud. Therefore, any party asserting an adverse title to the property, thus actually in the possession of the Court, was required to come into the Court having that possession to assert his claim; and cases where the possession was in a third party, under claim of adverse title, have no application.

(b) The Petitioners, upon the coming in of the report of the Referee carrying a recommendation favorable to them, *consented* to an order directing the sale of the property and substituting therefor the proceeds of such sale; and this sale was to be made by the Bank, one of the Petitioners. (Record 55.)

The Bank made sales of the property, reported the same to the Court, and in each case stated that "it *holds subject to*

the order of this court" the proceeds of such sale. (Record 57 and 61.)

(c) Having so declared and admitted that the proceeds were held subject to the order of the District Court, the present Petitioners presented petitions to that court setting up their claims of title to, or lien upon, the property so sold, and prayed the decree of that court awarding to them the proceeds of such sales.

Upon such a record certainly it is not now open to the Petitioners to deny the jurisdiction of the District Court to make the very decree that the Petitioners asked it to make.

II.

THE CASE WAS PROPERLY HEARD AND DISPOSED OF IN THE CIRCUIT COURT OF APPEALS, AS AN APPEAL; AND IN ANY EVENT, THE PETITIONERS, HAVING RAISED NO OBJECTION TO THE FORM IN WHICH THE CASE WAS HEARD BY THE CIRCUIT COURT OF APPEALS, CANNOT NOW QUESTION THE RIGHT OF THAT COURT SO TO HEAR AND DISPOSE OF THE CASE.

The proceeding started in the District Court by a petition from the Receiver (no Trustee having then been appointed) setting forth its possession of the property in question, the necessity of a prompt sale thereof, and praying a decree authorizing such sale. (Record 5, 6.) To this petition an answer was filed by the Bank, denying the jurisdiction of the court on the ground that "it holds in pledge to secure indebtedness owing to it by the bankrupt, warehouse receipts", specifying them and the property covered thereby, and setting up title to the seed by the transfer of these ware-

house receipts, and alleging also that they were in possession of the property. Rogers & Brother filed a similar answer, and the National Storage Company filed an answer claiming the possession of the property. Replies were filed denying the contentions set up in these answers. The matter was referred to the Referee, and on August 5, 1901, he filed his report recommending that the petition be dismissed (1) because the court was without jurisdiction, and (2) that the warehouse receipts were valid. On the same day the court sustained objections filed by the Receiver and creditors to the Referee's report on the question of jurisdiction, and entered a decree "that the said Receiver received and took possession from the Bankrupt peaceably the property in question, * * * and that the court had jurisdiction and possession of said property in this cause"; and without making any further order on the report of the Referee, and, by consent and "on the stipulation of Orville Peckham, Attorney of the First National Bank in open court that the said Bank will sell and hold the funds derived from the sale of said seed *subject to the order of the court herein*," it was further ordered that the seed, purporting to be covered by said warehouse receipts, be sold.

After making sale of the seed and reporting the same to the court, the First National Bank presented its petition (Record, 67-79) setting forth its title to the property, the sale thereof under the above order, the indebtedness due it, and praying an order that its claim be allowed and satisfied and paid out of the moneys held by it. Rogers & Brother filed a like petition (Record, 80). To these new petitions answers were filed denying the title and lien set up by the Petitioners. The National Storage Company also filed its petition setting up a claim for storage charges, partly as against the Bankrupt and partly as against the Trustee, and claiming payment therefor out of said funds upon the ground that possession of the property sold was in it, and that the

title thereto passed under its receipts, to which petition answers were duly filed.

On October 11, 1901, the District Court made an order consolidating all of the foregoing petitions, together with the answers thereto, and referred the case back to the Referee to take additional proofs, and report the same to the court "upon the said evidence and the evidence heretofore taken by the said Referee so far as the same shall be material."

Further proofs were taken, and on October 29, 1902, the Court made its final decree (Record, 114 and 115) holding that the right of possession of the property in dispute was in the Storage Company, that it had the possession of such property, and affirming the validity of the warehouse receipts.

From this brief statement of the pleadings and the nature of the proceedings, it is, we think, clearly apparent that the matter heard and disposed of in the District Court, was one as to which a right of *appeal* existed.

(1) *It was a separable controversey.*

The controversey was as to the title to and possession of property claimed by the present Respondents to form a part of the bankrupt estate. The object and purpose of the present Petitioners, by their answers to the original petition, was to recover from the estate this specific property. These answers in reality were intervening petitions for that purpose, and were so treated by the parties and by the Court. The Court had jurisdiction, as we have already said, because (a) it had the actual physical possession of the property, and (b) the Petitioners waived their original objection to the jurisdiction, and in the most explicit manner con-

sented to the Court hearing and disposing of the case. Section 23-b of the Bankruptcy Act confers jurisdiction where there is such consent.

In *Hewitt vs. Berlin Machine Works,* 194 U. S., 296, the Berlin Machine Works had filed a petition in the District Court claiming certain machines in the possession of the Trustee of the bankrupt, upon the ground that they had been sold upon conditional sales, valid under the laws of New York as against all creditors. From the decree of the District Court on this petition there was an *appeal* to the Circuit Court of Appeals, and from the decree of that court an appeal was taken to this court. In sustaining the right of appeal to the Circuit Court of Appeals, Mr. Chief Justice Fuller stated the rule applicable to such cases, thus:

> "If the trustee had carried the case to the circuit court of appeals on petition for supervision and revision under Section 24-b of the bankruptcy law (30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3432), the case would have fallen within *Holden vs. Stratton,* 191 U. S. 115, *ante,* 116, 24 Sup. Ct. Rep. 45, and the appeal to this court would have failed. But he took it there by appeal, though accompanied by some apparent effort to avail himself also of the other method. And as the Berlin Machine Works asserted *title to the property in the possession of the trustee by an intervention raising a distinct and separable issue,* the controversey may be treated as one of those 'controversies arising in bankruptcy proceedings,' over which the circuit court of appeals could, under Section 24-a, exercise appellate jurisdiction as in other cases. Section 25-a relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respect of which special provision therefor was required (Holden vs Stratton, 191 U. S. 115, *ante,* 116, 24 Sup. Ct. Rep. 45), while Section 24-a relates to controversies arising in bankruptcy proceedings in the exercise by the bankruptcy courts of the jurisdiction vested in them at law and in equity by Section 2, to settle the estates of bankrupts, and to deter-

mine controversies in relation thereto. *Hutchinson vs. Otis*, 190 U. S. 552, 47 L. ed. 1179, 23 Sup. Ct. Rep. 778; *Burleigh vs. Foreman*, 125 Fed. 217.

The appeal to this court then followed under Section 6 of the act of March 3, 1891."

In the case *In re Jacobs*, 99 Fed., 539, the Circuit Court of Appeals for the Eighth Circuit have held that the power of revision conferred by the Bankruptcy Act does not extend to proceedings in the District Court against third parties to protect assets of the estate, or suits or proceedings instituted by third parties against the Trustee in that court, and that such proceedings must be reviewed in the ordinary way by appeal or writ of error, when the controversey has reached a final decree in the court of first instance.

In *Plymouth Cordage Company vs. Smith*, 194 U. S., 311, Mr. Chief Justice Fuller, after quoting the provisions of the Bankruptcy Act, says:

> "The Bankruptcy Act clearly distinguishes between 'controversies arising in bankruptcy proceedings' and 'bankruptcy proceedings' proper, and between supervisory jurisdiction in a summary way in matter of law, and jurisdiction by appeal or writ of error. Appellate jurisdiction over controversies, as in other cases, is vested by Section 24-a, and over certain designated bankruptcy proceedings by Section 25-a, by appeal, as in equity cases, bringing up both law and fact."

That the present proceeding falls exactly within the language of Mr. Chief Justice Fuller in the Hewitt case as being "an intervention raising a distinct and separable issue," and "may be treated as one of those controversies arising in bankruptcy proceedings over which the Circuit Court of Appeals could, under Section 24-a, exercise appellate jurisdiction as in other cases," is more plainly manifest from these two further suggestions:

(a) The original objection made by the present Petitioners to the jurisdiction of the District Court, was upon the ground that the thing sought to be litigated must be made the subject of an independent suit in the State courts, and

(b) The Petitioners' counsel, on page 24 of his brief, suggests that the District Court should perhaps have made its decree without prejudice to the right of the Respondents to litigate with Petitioners in the State Court.

Both of these positions emphasize the correctness of our statement that the thing litigated could have made the subject of an independent suit, and therefore, constituted a separable controversey, and in the language of this Court in the *Hewitt case* could properly be treated as appealable.

(2) *As the Court of Appeals had jurisdiction over the subject-matter, and the objection now made relates only to the form in which the power of the court should be exercised, the Petitioners having made no objection to the Circuit Court of Appeals hearing and determining the case as an appeal, are now estopped from making such objection.*

It is of course conceded that the Circuit Court of Appeals had jurisdiction over the subject-matter—that is, the final decree of the District Court—brought before it by the appeal. The objection relates only to the form or procedure by which that jurisdiction should be exercised. The mode of procedure may in some cases affect or limit the extent of the jurisdiction of the court, yet the court having jurisdiction over the subject-matter, it could, with the consent or by the acquiescence of the Petitioners, hear and determine

the case; and the Petitioners having taken their chances of a favorable decision, should not now be permitted to make an objection which, to have been timely should have been presented to the Circuit Court of Appeals.

It has been held by the Circuit Court of Appeals for the Fourth Circuit, in *Chesapeake Shoe Company vs. Seldner,* 122 Fed. 593, that the court may, under proper circumstances, and against the objection of the respondent, hear an appeal as a petition for revision, and dispose of the case accordingly.

In the present case, observe that the jurisdiction actually exercised by the Court of Appeals was no more than it could have exercised upon a petition for revision. True the District Court in its final decree held that the Storage Company had possession of the property, but the language of the decree must be read in connection with the decree of August 5, 1901, in which the court decreed that "the Receiver had acquired and held peaceable possession of the property." The language of the decree was not a finding of fact in this respect, but a conclusion of law deduced from facts, not specifically found by the court.

It will be observed further that Petitioners' counsel does not challenge the correctness of a single statement of fact made by the Circuit Court of Appeals and upon which it founds its decree; and it will also be observed that all, or practically all of these facts, are found by the Referee.

(3) *It should not pass unnoticed that, even if the Petitioners' claim be restricted to a claim of lien or priority, the word "claim" in Clause 3 of Section 25-a is broad enough to authorize an appeal in such case.*

We call attention to this, not because we think it necessary to a decision of the case, but because the question is one of such importance that it would not be fair to the court not to present it in case the court should deem it advisable to consider and dispose of it in the present case.

The words of the Act are:

> "That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, * * * (3) from a judgment allowing or rejecting a debt or *claim* of *five hundred dollars or over.*"

As effect is to be given to each word of the Act, so far as possible, it must be taken that the word "claim" was not used as synonymous with "debt".

The word "claim" in its natural and ordinary acceptation, is broad enough fairly to include a claim of priority or lien. To hold that no appeal exists in such case would produce this anomalous result, that in case of dispute as to the *amount* of a debt of $500, the Trustee may appeal and obtain the judgment of the Circuit Court of Appeals upon both the facts and the law, and in that case the debt, as finally adjudicated, will share *only* pro rata with the other creditors; but if the claim be of priority or lien, for an amount, as here, which wipes out the entire assets of the estate, the Trustee can have no appeal, and is limited to a revision in matters of law. Of course, if Congress has so enacted, the law must be obeyed. But certainly every intentment is against a construction of the Act producing such a result. The manifest purpose of giving to the Trustee a right to appeal from a judgment or decree fixing the amount to be paid out

of the estate upon any debt or claim, was to protect the creditors in the distribution of the assets of the estate; and in order to effectuate such a division, it certainly seems to us necessary that the word "claim'" should be so construed that the right of appeal as to a claim of priority, should be co-extensive with the right of appeal in the case of a decree fixing the *amount* of the claim. Of course, in every bankruptcy case the assets are not sufficient to pay all creditors in full; otherwise there would be no bankruptcy. The most important questions that arise in bankruptcy are, ordinarily those concerning liens and priority, and certainly Congress never intended that as to them no right of appeal should exist.

The use of the word "judgment" in this connection makes no difference, because the same word is used in describing the decree adjudging, or refusing to adjudge, the defendant a bankrupt, and also in describing the order made granting or denying a discharge.

We are not unmindful of the language used by this court in *Hutchinson vs. Otis,* 190 U. S., 552, but in that case the court is explicit in stating that the question is disposed of summarily because the case had been very satisfactorily decided on the merits by the Circuit Court of Appeals upon a petition for revision.

III.

THE WAREHOUSE RECEIPTS WERE INVALID, AND THE ENDORSEMENT THEREOF TO THE PETITIONERS DID NOT VEST IN THEM ANY TITLE TO THE PROPERTY PURPORTING TE BE COVERED BY SUCH RECEIPTS.

The National Storage Company is an Illinois corporation, and by its charter is authorized to carry on a general ware-

house business, to receive for *safe keeping* or *storage*, general merchandise, etc., and to issue receipts or certificates for goods or personal property to the owner or owners thereof when received by the Storage Company.

On August 25, 1900, the Storage Company made a written proposition to the Bankrupt, which was accepted by him, and this proposition contained the following significant language:

> "1. The National Storage Company hereby proposes *to issue its storage warrants to the order of yourself* or to such order as the acceptor hereof may hereafter direct, upon personal property consisting in part of Field Seeds *to be stored in the premises known as No. 220-230* Johnson Street, Chicago, Illinois. * * *
>
> 3. Rates, Terms and Conditions which shall govern the storage of property or issue warrants under this proposal are as follows:
>
> On property valued at $10,000 or less, the charge for the first calendar month or fraction will be $7.50, for each succeeding month or fraction $7.50, and for each additional $1,000 or fraction, the rate will be $.75 per month.
>
> All traveling expenses and other incidental expenditures incurred while conducting the business under this proposal, and all costs of placing property in store, such as measuring, weighing, tallying, surveying, platting or drafting, etc., will be added to above charges. A certified memorandum must be rendered, showing market value of the property placed in store on which storage charges are to be based.
>
> 4. *Substantial* fences, gates, partitions, doors or other forms of enclosure, for enclosing or protecting property, for which warrants of this Company have been or may hereafter be issued, *shall be constructed* and kept in repair by acceptor hereof, and if not so constructed or repaired upon request, this Company is hereby authorized to forthwith construct or repair same, and place

any cost therefor as a charge against the property enclosed or protected thereby."

At this time the Bankrupt held under lease and occupied in carrying on his business as a wholesale seed merchant, six stories and basement of the building, No. 220 to 230 Johnson Street, Chicago, and on August 31, 1900, he executed and delivered to the Storage Company a lease for the entire premises covered by his lease, for a term of three years, "and so long thereafter as property remains thereon for which warrants of said Storage Company *have been issued* and *are in force and effect,*" the rental being one dollar and other good and valuable considerations, and this lease contained the following condition:

> "That the said leased premises shall be *used and occupied exclusively* for the storage of personal property, and for the transaction of such other business as may be connected therewith, or incident thereto, in pursuit of any rights claimed in performance of duties of said Storage Company as Warehousemen."

Thereafter the Warehouse Company issued to the Bankrupt, warehouse receipts or warrants to his order for property located upon these premises. These warrants contained a provision releasing the company from the responsibility for any loss or damage to the property. The warrants were used by the Bankrupt as collateral for loans, there being about twenty such warrants outstanding at the date of the bankruptcy.

The facts are thus stated by Judge Jenkins in his statement of facts in the Circuit Court of Appeals:

> "The Storage Company had no warehouse of its own, only such as was leased, as was the one in question here. It had no keys to this building. The bankrupt alone had the keys, and access thereto was obtainable only through him. The signs placed upon the walls of the building were obscured and not readily

observable by reason of the fact that the piles of seed were higher than the signs. After the lease, he continued as before to carry on his ordinary business upon the premises, maintaining an office with sundry clerks and workmen upon the premises. He bought and shipped seed, cleaned the same, and occasionally cleaned seed on which receipts were issued, taking it out of the bags, cleaning it and restoring and adding a sufficient amount of other seed to equalize the loss in the cleaning. Also, in some instances, the Bankrupt shipped out the property before the receipts were cancelled; but the Storage Company did not know of it. The Bankrupt, also, from time to time, as the exigencies of his business prompted, brought seed to the warehouse and substituted it for seed on which receipts had been issued, removing the seed on which receipts had been issued and replacing the tags on the bags substituted. This was done *in many instances,* and sometimes *several times* with the property covered by one receipt. Whether the Storage Company knew of this custom of business is left somewhat doubtful by the evidence. The Storage Company, however, had notice of the custom of the Bankrupt to clean the seed so placed in storage. The inspector of the Storage Company called at the premises from one to five times a week. Once or twice a week he would check over the goods stored and see that the tags were on the bags and that the stock was all right."

And in his opinion he further says:

"We are to ascertain the real intention of the contracting parties from the whole agreement, read in the light of the surrounding circumstances. The Bankrupt was largely engaged in purchasing seed upon credit, storing the property purchased in his warehouse. He occupied the premises as a place of business, maintaining an office there, with clerks to assist in the management of the business, and with porters to handle the seed. The premises were subject to a rental of $250 a month. He arranged with the Storage Company, which had no warehouse of its own, that it would issue

warehouse warrants or receipts to the Bankrupt for property upon the Bankrupt's premises, for a certain small charge per month upon the value of the property covered by the receipts. He executed a lease of the premises to the Storage Company, to continue so long as the Bankrupt should desire and so long as property remained thereon for which warrants or receipts had been issued; and this without any payment of rent by the Storage Company, the rental in fact being paid by the Bankrupt. The Storage Company neither required, nor was it given, any key to the premises. The Bankrupt remained in possession of the premises as before the agreement, continuing to transact his business there as he had formerly done. There were certain signs placed upon the different floors of the building, indicating that the Storage Company controlled the premises. These were small and obscure signs, not likely to attract attention, and most of them hidden behind the piles of bags of seed. No sign was displayed upon the exterior of the building indicating any proprietorship of the Storage Company, or giving notice to the world that any other than the Bankrupt had possession and control. There was no open, notorious manifestation of a change of possession, none was intended, and there was none in fact. Upon each pile of bags of seed for which the warehouse receipts or warrants were issued, there was placed a small tag, which might be discovered upon careful search. The Bankrupt substantially treated this property as his own; at times going through the forms prescribed by the Storage Company; and whenever he found it necessary, ignoring them. We do not find that the Storage Company had knowledge of this action of the Bankrupt; but it certainly knew that it was possible under the circumstances for the Bankrupt to do with the property as he would, since it was left within his control.

"It is difficult for us to look upon this transaction as a warehousing of property. The Storage Company assumed no liability to the Bankrupt, and assumed only such responsibility as the law imposes upon it with respect to those advancing money upon the faith of its

warehouse warrants or receipts. The name of the company is in itself, under the circumstances, a false pretense. It did not store property. It had no premises upon which to store property. The Bankrupt stored the property. The Bankrupt paid the rental of the premises. It is true that an agent of the Storage Company occasionally visited the premises and inspected the property in a sort of way, but exercised no supervision or control that would prevent the Bankrupt from doing with it as his will might dictate, or his financial necessities might require. We cannot but regard this arrangement as a subterfuge, a mere device to enable the Bankrupt to hypothecate the warehouse warrants or receipts, and so to raise money upon secret liens upon property in his possession and under his control. The written agreement indicates this. It is somewhat startling to learn that a warehouse company should store goods of this character for another upon the premises of that other, taking compensation as for storage, not related to the cost of storage, or to the expense of receiving and delivering the property, not according to the space occupied by the property, but according to the value of the property. The fact here is patent that the Storage Company assumed to the Bankrupt no liability, and that the sole purpose was to issue warehouse warrants or receipts, making such inspection, only, as in its judgment would protect it from liability to third persons by reason of the issue of its warrants. To uphold such a scheme would permit every merchant in the state, notwithstanding the declared policy of the state to the contrary, to have possession of large stocks, thereby inducing credit, and to cover them with secret liens, thereby deceiving creditors. It would, in effect, permit such merchant to pledge his entire stock without change of possession, without record of it, and without notice to the world. Such a scheme is disapproved by the law of the State of Illinois, which, in this instance, we are bound to uphold, however specious may be the device, or however attractive may be the form, by which it is cloaked. Such a scheme within the State of Illinois is constructively fraudulent as to creditors, and voidable by creditors."

That this statement is exceedingly conservative is apparent from a brief reference to the testimony.

Rodgers, the Bankrupt, testified that warrant number 9436 for 221 bags of buckwheat was received by him and delivered to Rogers & Brother under these circumstances: The Bankrupt had warrants pledged for two lots of buckwheat; he had three lots on his premises. He received an order, by sample, for two cars (or lots) and on May 6th, without having any release, he shipped out the lot covered by the Rogers receipt. On the next day he telephoned the Storage Company for a receipt for the remaining lot of buckwheat, and upon going to the Storage Company's office, received the warrant about 11 o'clock (Record, 211), and this was before the inspector of the Storage Company examined the property, as Rand, the inspector, was not at the Bankrupt's place till about 12 o'clock (Record, 193, 194). The Bankrupt then testifies (Record, 216, 217):

> "My way of doing business with the National Storage Company was just the same as in this case of the car of buckwheat. I would put the goods in store, would telephone my application, then go and get the warrant. That was not always done the same time of day before banking hours in the morning, sometimes it was done in the evening or in the afternoon. I would have this application made, but I would not make it. Sometimes I would telephone, and sometimes Vaas, the bookkeeper, would telephone, for the warrant. I would tell them I wanted to get warrants on certain lots of seed, so many bags, such a weight, located in such a section number, on a certain floor, and then they would go down and get them, and I would sign this application at the time that I telephoned. I had the blank applications, that yellow sheet there is it, and then after I had telephoned them I would fill out the blank application and sign it, and I think they came down for it when they made the examination, but I don't know that part of it. We got most of the warrants in the forenoon

before clearing. I always tried to get my deposit in at least fifteen minutes before 11. * * * *In other words, the National Storage Company took my word for the statement that there were certain bags of seed in a certain portion of the warehouse, then the inspector would go around any time and verify it, and I would get those warrants before any tags would be put upon the bags."*

Then under cross-examination he states, (Record, 223, 224):

"When I say, as I did on direct-examination, that I used the premises there the same since I made the lease to the National Storage Company as I did before, I don't know that I can answer any different from what I have. I used the floors. I rented them, and I used them. I don't mean to say that the Storage Company did not have any grain. They used those sections and issued warehouse receipts on the goods stored in different sections. By using the sections and issuing warehouse receipts by the Storage Company I mean I used them just the same all the time, from the time I got them until this thing occurred; there was not any difference that I know. The company had issued warehouse receipts on those goods in those different sections, and when I say I used them I mean with reference to the fact that those goods were in there on which the warehouse receipt had been issued. I mean to say I moved the stuff out from a section that was covered by a warehouse receipt to put my own property in there, that was not covered by a warehouse receipt. I don't mean to say that all the property I put in there in those different bins or sections was changed by me while the receipts were outstanding on them. Those that were not changed I did not interfere with, so that to that extent I did use the premises the same after this lease was made as I did before it was made. I used them the same all the time. When I say that I used them all the same all the time, I think I mean that if I wanted a warehouse receipt and there was not any goods in that space I put stuff there and asked for a warehouse re-

ceipt. *If I had a space there that I wanted to pile up a car of my own seed and issue my own warehouse receipt of it, I would do it when it was vacant.*

I took out seed on which warehouse receipts were issued without cancelling or having the receipts returned, and substituted other seed for it. It was not merely that I occasionally took seed and cleaned it and put it back, but I also took out seed on which warehouse receipts were out, and without changing those receipts took that seed and carried it away and brought back other seed in place of it without saying anything to the storage people about it."

Black, Rodgers' foreman, testifies as to the method of business, as follows (Record, 233, 234):

"It was part of my work while with Rodgers as foreman to attend to the storing and the weighing out and piling of this seed. When a carload of seed was brought in there to be piled up in storage, I would locate a vacant place and have it put there. When it was piled up it was cleaned and bagged. I have noticed those pasteboard tags of the National Storage Company that were placed on certain piles in the warehouse. Mr. Rand generally placed those tags on the piles there while I was foreman. The tags were kept in the office before they were used. I never in any instance placed the National Storage tags on original lots. I mean by original lots, the first time that a lot comes into the place. When the order would come to me from Rodgers' office to ship out any of those piles that had on them the tag of the National Storage Company, I would go to the car and ship it. It would be taken from a pile and transferred to the car. In case there was a National Storage tag on the lot I would take the tag off, and when Vaas was there give it to him. I could not state any particular instance where the tag was taken off by me. There were cases where this was done. When it was taken off I would keep the tag on my person or in the

> desk. In case the pile was not replaced at the time I would either tear it up or turn it in to the book-keeper. It is a fact that I tore up some of those tags in such cases. In cases where a pile having an actual storage tag thereon was thus shipped away and the pile was replaced by another lot, I would put the original tag right on that pile."

Black then gives a long list of cases showing memoranda kept for seed shipped out, with the marks and quantity and the word "Replace", and testifies that this was seed for which warrants were outstanding which was shipped out and afterwards replaced.

Vass, the Bankrupt's bookkeeper, testifies substantially to the same effect.

This testimony we refer to simply as illustrative. So far as it describes the manner in which the Bankrupt conducted business, it is uncontradicted; the position of Petitioners being that the storage company did not know that the business was so conducted. As the officers or employees of the warehousing company would probably be liable, under the law of Illinois, to imprisonment for not less than one year and not exceeding ten years for permitting acts of this character, it is not strange to find no such admission from them in the Record.

If visits were made to the Bankrupt's premises by the Storage Company's inspector as frequently as claimed, either those visits must have been of a most perfunctory character, or else the Storage Company's inspector was grossly negligent in not discovering the manner in which the business was being carried on.

Observe further, Rodgers kept on hand a lot of blank tags. (Record, 250.) Why should Rodgers have blank

tags of the Storage Company in his office, if these were intended to be placed by the Storage Company on the property after it had been receipted for by their inspector?

As to the signs and tags.

The signs were blue enameled tin signs, 3 in. by 7 in.

Black, the foreman, testifies as follows (Record, 243):

> "In reference to the tin signs, I examined the premises the morning of the last day that I testified. I visited all the floors. On the 8th of May there were bags actually piled before the six blue signs that I testified about the other day. Not before all of them, two or three. I could not say. There were six of these tin signs to my knowledge. They were, at a rough guess, fifteen or twenty feet from any window. If you were close enough you could read them, that is all. If you were five or six feet from them. If anybody stood at the door leading into the particular floor in which a tin sign was placed he could not read the tin sign from the door. There were no signs of the National Storage Company on the outside of the building, to my knowledge."

And again (Record, 246):

> "Saw six of these tin signs the last day I was up there. I said they couldn't be seen if there was a carload piled in front of them. They couldn't be seen standing on the gangway in front of the carload. Am sure of that. That would depend a good deal on the height of the man, he would have to be ten or twelve feet high to see them, because you couldn't see the tag over the pile. It is not a fact that the tin sign was put near the roof and above the pile of sacks. It was just in front, nearly on a level where the top of the pile of sacks comes to. Well, it may be that it was above the level of the pile of sacks. The pile of sacks in those sections was about seven feet high."

Rodgers, the Bankrupt, testifies these signs were so inconspicuous that he never saw them. (Record, 218, 224.)

Rand, the Storage Company's inspector, still in their employ, and who testifies in all respects as strongly as he can in favor of the company, says, (Record, 205):

> "I desire to make a correction in my testimony. I said yesterday or Saturday in the course of cross-examination, that if a person stood exactly in front of one of those piles he *might* be able to see the sign. I want to correct myself. I went out and found the signs cannot be seen from the front of the piles very readily—as well as they can a little further off, I mean the blue tin signs tacked on the wall."

The tags were but little larger than ordinary shipping tags, and but one tag was used for each warrant, that is, one tag on a pile of 250 to 500 bags. (Rand, Record, 177,185.) The total number of the Storage Company's warrants outstanding at the date of bankruptcy was about twenty, so that there would be but that many of these small tags on the entire seven floors (including basement) occupied by the Bankrupt. In considering these tags it should be remembered that the Bankrupt had his own tags on the bags of seed and also was issuing his own warehouse receipts. Under such circumstances the presence of a few tags would amount to nothing —certainly they could not effect a change of possession.

The lease to the Storage Company was made August 31, 1900. May 8, 1901, the bankruptcy petition was filed. The liabilities of the estate, according to the schedule, were $63,833.19. (Record, 332.) The assets, aside from the proceeds from the sales of seed claimed under these warrants, amount only to probably $6,000 or $7,000, out of which must be paid the expenses of the administration,

which in January, 1902, already amounted to $1500, not including compensation to the Trustee and counsel. (Record, 344.)

In *Union Trust Company vs. Trumbull,* 137 Illinois, 146, the receipts issued by the Storage Company involved in this case, but under less objectionable circumstances, were declared invalid by the Supreme Court of that state. In that case Hall & Company, who were merchants and factors in wool in Chicago, made leases to the Storage Company of certain floors of their warehouse. The Storage Company issued receipts which were pledged by Hall & Company, as collateral for loans. Hall & Company made a voluntary assignment for the benefit of creditors. The question of the validity of the receipts arose in a contest between this voluntary assignee and the holders of the receipts. The Court held the receipts invalid, saying:

> "Hall & Company retained the actual possession and control of their warehouse after the execution of the leases as before. The business of the Storage Company was under the immediate control of one Stephens, its secretary and manager, and he had three helpers and an office boy under him." * * *
>
> "The evidence shows that Stephens, or one of his helpers, visited the rooms of the warehouse as often as once or twice a week, during business hours, and looked around to satisfy themselves what wool was on hand, but they never assumed to take actual control of either of the rooms, or to interfere with Hall & Company's control and conduct of the warehouse in any respect." * * *
>
> "It is contended on behalf of the storage company, that signs were put up by the storage company in and about different parts of the warehouse, as its receipts

were issued, notifying the public that the storage company had possession; but the clear preponderance of the evidence is that such signs were not put up and kept up in such a way as to advise those dealing in the wool with the Halls, of any claim of possession on behalf of the storage company." * * *

"To the existence of a pledge, the possession, either actual or symbolical, by the pledgee, of the personal property which is the subject of the pledge, is absolutely essential. Ordinarily, actual and physical possession of the property is delivered to and retained by the pledgee; but where the actual delivery is to a carrier or warehouseman, and a bill of lading or warehouse receipt is given therefor, the assignment or transfer of such bill of lading, or indorsement of such warehouse receipt, with delivery thereof to the pledgee, is regarded in law as the delivery of possession to the pledgee of the property which the instrument represents, the bill of lading or receipt standing in the place of the property, of which it is the symbol. * * * But it is a necessary condition to the existence of such symbolical possession by the pledgee that the property itself is in the possession of some person or corporation other than the pledgor. Here the indorsements and transfers of the supposed warehouse receipts to the receipt holders were ineffectual to constitute them valid and legal pledges of the wool to secure the debts for which they were hypothecated, and this, *both because the National Storage Company did not have possession and control of the wool,* and because the wool mentioned in each receipt was not so set apart and distinguished from other wool as that it could have been found and identified by the receipt. The storage company was not, under the law, authorized to issue warehouse receipts.

This decision by the Supreme Court of the State, declaring the law in respect of such transactions, is, we submit, conclusive against the Petitioners in this case.

In *Bank vs. Jagode*, 186 Pa., 556, the case turned on the question of the validity of certain warehouse receipts, and Mr. Chief Justice Mitchell said:

"The substantial question is whether the receipt was in fact issued by a bona fide warehouseman.

The Act of September 24, 1866, P. L. (1867) 1363, makes a warehouse receipt negotiable to the extent that the person taking a transfer of it by indorsement and delivery is to be deemed the owner of the goods therein specified. By the general law governing such instruments this means that the transfer of the receipt is a constructive delivery of the goods. If therefore the receipt under which the plaintiff claims was a valid warehouse receipt within the statute the plaintiff's title must prevail, notwithstanding the good faith and priority of the appellant's actual possession.

But in order to have this effect, the requisites of the statute must be complied with, and plainly the first of these is that *there must be a receipt issued from a bona fide warehouse*. The act does not prescribe any form of receipt, and it is conceded that the one in controversy is sufficient in that respect. It purports to be issued by a warehouseman, and to be for goods held on storage and deliverable on the order of the depositor and the return of the receipt.

Nor does the act define a warehouse or a warehouseman, but uses the latter word in connection with "wharfinger or other person" (*ejusdem generis. Bucher vs. Com.*, 103 Pa., 528), in its ordinary signification of *one who carries on the business of receiving and keeping goods on storage* for the owners, for compensation. The act prohibits the issue of a receipt unless the goods shall have been actually received into store or upon the premises of the warehouseman; the issue of any second or duplicate receipt while the first is outstanding, without writing the word duplicate across the face of the second; the delivery of any goods receipted for except on surrender of the receipt; and the sale, incumbrance, etc., by the warehouseman of goods receipted for. These provisions plainly contemplate that the warehouseman shall be one engaged in the business, and also that he shall be another than the owner of the goods. A large part of the security of the holder of the receipt for the actual production of the goods when called for is the business interest and good faith of the ware-

houseman, and the penal consequences of any breach of duty to him. This security would be greatly diminished, if not rendered worthless, if any owner could choose to say his goods were on storage with himself and issue receipts which should pass from hand to hand for value, while the goods remained under his own control, or subject to levy by his creditors. * * *

"In the present case one Turtle issued the receipt in question, in sufficient form as already said, purporting to be from 'Turtle's Warehouses, 220, 222 and 224 Wood St.,' and plaintiff at the trial showed the issue of a number of similar receipts by Turtle, over a period of about two years; the negotiation of loans by several New York banks to the Keen-Sutterle Company, on these receipts; and the lease by Turtle of the premises on Wood street in his own name as a warehouse. * * * It appeared that Turtle, during all the time he was nominally keeping the warehouse and issuing receipts for goods on storage there, was a clerk in the employ of the Keen-Sutterle Company, at a salary; that the rent of the so-called warehouse was not paid by Turtle, but by the Keen-Sutterle Company or by F. W. Sutterle, one of the partners, and the rent due to Turtle from the sub-tenants of a part of the warehouse was not paid to him but to the Keen-Sutterle Company or F. W. Sutterle, and the only explanation given was that there was some private arrangement, not disclosed, between Turtle and Sutterle, on this subject; that no storage charges were paid by the Keen-Sutterle Company to Turtle on account of this warehouse, nor any credit given him on their books; that no persons other than the Keen-Sutterle Company deposited any goods in the so-called warehouse, though a few receipts were issued in the name of J. B. Moors & Company, under some arrangement with the Keen-Sutterle Company, which the learned judge declined to permit to be inquired into; and that Turtle had no sign on the warehouse to indicate his proprietorship, kept no books of the business except a book of blank receipts, had no office or even a desk in the warehouse, did not keep the key in his possession, was rarely there, and left the

whole charge, including the depositing and removal of goods, to the employees of the Keen-Sutterle Company. On these facts it is perfectly clear that there was no real warehouse at all in the case and that Turtle was a mere employee or man of straw used by the Keen-Sutterle Company to cover their own operations with their own goods. * * * *

"It is not a question of good faith, or even of diligence, on plaintiff's part, but of the possession of a good title by means of a valid and genuine receipt. This the plaintiff has failed to prove. *The paper given to it was not such a receipt, but a fraudulent imitation,* and the bank must, unfortunately for it, bear the loss."

In *Moors vs. Jagode,* 195 Pa., 163, a case quite similar to that last mentioned, Mr. Chief Justice Mitchell, in denying the validity of the warehouse receipts, says:

"Neither party being in any fault, the superiority of right must be determined by the strict legal title.

"This depends, as the learned referee correctly held, on the decisive question whether the wool was *in fact "stored"* with a warehouseman so as to bring the title of the holder of a receipt within the protection of the Act of September 24, 1866, P. L. (1867) 1363. This act is in derogation of the common law, and establishes an exception to the general course of business which is conducted on the presumption that title to personal property accompanies possession. To bring a case within the exception, therefore, all the requisites of the statute must be shown to exist. We had occasion to consider the act in *Bank vs. Jagode,* 186 Pa. 556, and it was there held that *the receipt must be one issued by a bona fide warehouseman,* and the mere holding himself out to the world or general repute is not sufficient if he is not such in fact."

In *American Pig Iron Storage Warrant Company vs. Sinnemahoning Iron & Coal Company,* 205 Pa., 403, the Iron Company leased to the Storage Company property adjacent

to its furnace, the Furnace Company fenced the property in, and the iron, as it came from the furnace, was piled in this yard and the Storage Company issued its receipts therefor. The contest was betwen the landlord of the Iron Company and the holders of the receipts. In sustaining the claim of the landlord, Mr. Justice Dean uses this significant language:

> "This act was obviously framed for the protection of the warrant holders and it is the duty of the courts to give full effect to its intent, but they cannot go further and by construction disregard or subvert the law which long settled the rights of a landlord to distrain for rent the goods on the demised premises. But for this act, there could be no question raised as to the right of the landlord to seize this iron made in the leased furnace from ore and coal mined on the leased land. It had been taken from the casting house and piled about the same distance from the furnace as it would have been, had there been no transfer to the storage company. *The warrant itself does not determine and fix that the iron has been warehoused; there must have been an actual change of possession; any other ruling would suggest a most fruitful method of fraud which is not warranted by any reasonable interpretation of the act.*"

The rule is well settled that, in the absence of statute specially authorizing it, receipts issued by the owner for property stored in his own warehouse are invalid, and this upon grounds of public policy.

Geilfuss vs. Corrigan, 95 Wis., 651.
Bank vs. Whitehead, 149 Indiana, 560.

The owner is not allowed to evade this rule by having a clerk or employee rent the warehouse and issue the receipts.

Bank vs. Jagode, 186 Pa., 556.

Under the facts here, how does the present case differ in reality from these cases? The owner stored the property,

cared for it and had the full control and dominion over it. The warehouse company rented to him its name for the issuing of receipts. In principle it seems to us the cases are precisely the same.

On the question of warehousing we state our position thus:

(1) The Storage Company had no *warehouse*, and the property purporting to be covered by its receipts was not *stored* with it.

(2) The Storage Company did not have any possession of the warehouse, nor did it have possession of the property claimed under these receipts.

All of the cases concur in holding that the court will look at the facts as they actually existed and will not be bound by the forms which the parties may have adopted.

The Storage Company had no warehouse. The lease to it was a pure fiction, and in fact fraudulent. It states that the leased premises are to be "used and occupied *exclusively* for the storage of personal property" by "said Storage Company as Warehousemen." The Storage Company paid no rent, the Bankrupt paid the rent. The party actually in the possession of the property—who had the real and beneficial possession and who exercised the real dominion and control over the premises—was the Bankrupt. He kept the keys. He could admit or exclude the Storage Company at his will. The proposition of the Storage Company to Rodgers was not to *store* property, but only "to *issue warehouse warrants* to the order of" the Bankrupt, upon property located upon *the premises of the Bankrupt.* For this it was to be paid

not for *storage,* but in proportion to the *value* of the property covered by the receipts.

The Bankrupt received the property, placed it upon the premises as suited his convenience and when he desired a warrant he designated the property for which the warrant should be issued, and where that property should be located. The property continued in his care, under his custody and at his risk. The Storage Company assumed no responsibility whatever with respect to the care or custody of the property.

Under such circumstances is it not idle to contend that the property was *stored* with the Storage Company?

As to possession.

It is urged that the Storage Company was in possession of the property covered by its receipts. The contention is not as to the real and substantial possession but is purely technical. Possession implies dominion or control over the property. It implies the physical power to control the property and to dispose of it. In this case the Bankrupt had absolute and complete control over the property at all times *and in fact exercised it.*

It is argued by the Petitioners that the Storage Company had sufficient possession under the circumstances, and for this position a large number of cases are cited. A careful examination of these cases will show that they are readily distinguishable and fall within the following classes:

(1) Where the property had been placed in the possession of a third person and *beyond the control of the debtor.*

(2) Where the property, by reason of its bulky and ponderous character, or its situation, was *incapable* of actual delivery, and in this latter case the parties are required to do everything that, in view of the nature of the property and the circumstances surrounding the transaction, it is possible to do to make manifest publicly the change of possession.

These case therefore do not apply here, for these reasons:

(a) This case involves perishable property, easily handled and readily susceptible of delivery and actual possession.

(b) Even if complete physical possession of the property could be dispensed with, the Storage Company in no sufficient manner gave notice of its claim to the possession of the property as against the Bankrupt and his creditors.

The rule and the reasons for it are stated in *Gibson vs. Stevens*, 49 U. S. 384, one of the cases cited by the Petioners. In that case McQueen & McKay, on April 4th, 1850, purchased pork and flour then in the warehouse of the vendors at Fort Wayne, Indiana, to be delivered to the vendees by canal at Toledo, Ohio, receiving a memorandum of the sale and a receipt for the purchase money and an engagement to deliver the merchandise on board canal boats soon after the opening of canal navigation; and these documents McQueen & McKay pledged with Gibson as security for loans, on April 17th. On April 27th the property was seized on an attachment. After holding that under the circumstances of the case the transfer of these papers amounted to a symbolical delivery of the properties, Mr. Chief Justice Taney says:

> "The rule is not confined to the usages of any particular commerce but applies to every case where the thing sold is from its character or situation at the time *incapable* of actual delivery. The contract between the

> plaintiff and McQueen & McKay having been made in NewYork, the articles in the warehouses at Fort Wayne *were incapable of actual delivery;* consequently the delivery of the evidences of title with the order to the bailees endorsed on them passed the title and possession to the plaintiff."

It will be observed that this was the case of a *sale,* and the decision is put upon the ground that under the circumstances actual delivery could not be made, and that the reasonable time within which the vendee should *remove* the articles was to be determined upon a view of all the circumstances.

The further qualification of the rule is also pointedly stated in *Clow vs. Woods,* 5 Sergeant & Rawle (Pa.) 275. In that case a tanner executed a mortgage on certain personal property to secure two creditors. The mortgage was not recorded, and the property remained in the possession of the tanner under an agreement with the mortgagees that he should finish the process of manufacture, and for that purpose use the tools and bark. The property was levied on by creditors, the Court held the mortgage invalid, and in the opinion, Mr. Chief Justice Gibson states the rule applicable to cases where possession *cannot* be delivered, thus:

> "But where, from the nature of the transaction, possession cannot be given, the parties ought in lieu, to do everything in their power to secure the public from that deception which the possession of property without the ownership always enables a person to practice. When a ship at sea is sold, the brand bill of sale is delivered, and that divests the vendor of his last badge of ownership and when goods are too bulky to admit of manual possession, the key of the room is handed over. In every case where possession is not given, the parties must leave *nothing* unperformed, within the compass of their power, to secure third persons from the consequences of the apparent ownership of the ven-

> dor. * * * In a case of this kind, the ***slightest*** neglect in *any* circumstance *the nature of the case may admit* of as an *equivalent* for actual possession, is *unpardonable.*"

The question was very fully considered by this Court in *Casey vs. Cavaroc,* 96 U. S., 467, one of the Credit Mobilier cases, where in discussing the validity of a pledge of collateral securities, Mr. Justice Bradley says:

> "The possession need not be actual, it may be constructive; as where the key of a warehouse containing the goods pledged is delivered, or a bill of lading is assigned. In such case, the act done will be considered as a token, standing for actual delivery of the goods. *It puts the property under the power and control of the creditor.*"

Again in the same case, after reviewing cases under the civil law, he proceeds:

> "Troplong deduces, from these and other cases, the general conclusion that, whenever the assistance of the debtor is necessary to the better accomplishment of the object of the pledge, it ought to be permitted, provided always that it does not disturb the possession of the creditor in any respect. *Nant.,* No. 313. Dalloz says: 'It is evident that if the pledge of movables could, without a delivery, have effect in regard to third persons, it would be the source of great frauds and deceptions. When the debtor is obliged to surrender possession, he cannot deceive third parties dealing with him by keeping possession of the pledged articles as part of his estate, and getting credit thereby.' He takes special notice of the decision that a pledge is not valid if the dispossession of the debtor is not sufficiently complete to *prevent* substitution; or if there is a mere contract for a pledge, and not an actual pledge. Dalloz, *Rep. Nant.,* 119. And he lays down the principle that, though a contract for a pledge may be enforced against the pledger and his heirs, *Nant.,* No. 121, yet that, by the very words of the Code, he cannot set up the privilege

of the pledge, which alone constitutes his right as against third persons, without actual possession or its equivalent."

In *Moors vs. Reading*, 167 Mass., 322, Houdlette, a dealer in iron, carrying a stock of goods in his store in Boston, borrowed money from the plaintiffs and executed to them a general collateral agreement setting forth that all the merchandise transferred or to be transfererd by him to them should be held only as security for present or future indebtedness. Houdlette executed to the plaintiffs from time to time bills of sale for goods in his store which were intended to cover all of the stock of goods in the store. Soon after the date of each bill of sale the plaintiffs took possession, by going to the store, formally receiving possession of the goods, and appointing Houdlette's book-keeper as the plaintiffs' agent, and as sales would be made written orders would be given to the book-keeper to release or surrender portions of the goods included in the bills of sale. The book-keeper was paid by Houdlette. In holding that the plaintiffs were not entitled in replevin to recover the property as against Houdlette's assignee, the Court, by Mr. Justice Allen, said:

"If it be assumed that there was from time to time a sufficient taking of possession by the plaintiffs at the outset, the facts effectually negative the plaintiffs' view that there was any such retention of possession by them as to meet the requirements of the law. The obvious purpose of the statutory provision as to unrecorded mortgages, and of the rule of law as to the retention of possession by pledgees, is to prevent mortgagors or pledgors, by means of their possession of the property, from misleading people into the belief that they are its real owners. Accordingly the rule is general that, if mortgagors whose mortgages are unrecorded, and pledgors, are allowed to remain in possession of the mortgaged or pledged property, the mortgagees or pledgees will lose their lien."

In *Drury vs. Moors,* 171 Mass., 252, Houdlette, an iron and steel merchant, having a store at the corner of Franklin and Hamilton streets in Boston, leased a lot on High street at some distance from his warehouse, which lot was enclosed partly by the walls of an adjoining building and partly by a fence with gates. The key to one of the gates was kept in Houdlette's store over the desk of his book-keeper, Garrett, who acted as the representative of the defendants. Houdlette made bills of sale for portions of the iron in this store to the defendant as security for money loaned, receiving the bills of sale endorsed with a memorandum of delivery. After the insolvency the key was delivered to the defendants. The Court held that there was no sufficient delivery of possession to constitute a valid pledge, and after referring to the case of *Moors vs. Reading, supra,* Mr. Justice Holmes, delivering the opinion, said:

> "The additional facts (are) that the goods were under lock and key in Houdlette's private enclosure and that the only key known, so far as appears, was in Houdlette's possession. The testimony is that the key was kept in Houdlette's office over the desk of Garrett, the book-keeper, whom Moors had made his agent to keep possession of the property, but it nowhere is suggested that he held this key adversely to Houdlette, or that he had any such relation to it that he could have sued for it if it had been carried off."

In *American Pig Iron Storage Warrant Company vs. German,* 126 Ala., 239, a case cited by the Petitioners, the rule is stated thus:

> "Notice to the public of the pledgor's interest in the property is sufficiently given by the possession which must reside in the pledgee. Such *possession,* however, to be effective either for notice or to give validity at law to the pledge *must* be *complete, unequivocal* and *exclusive* of the pledgor's possession in his own right."

In *Lilienthal vs. Ballou,* 125 Cal., 183, Phillips Brothers & Company, merchants, transferred a stock of merchandise to Trustees as security for the payment of claims of attaching creditors, under an agreement which provided that the managing partner should be continued at a salary, subject to the supervision of the Trustees who did not take personal possession, and the business was continued under the control of the same manager, and with the same employees as before, and the conspicuous signs of the partnership were allowed to remain, *with a small and less conspicuous sign added containing the names of the Trustees designated as successors to the firm. Held,* that there was no sufficient change of possession to prevent seizure of the property under attachment by another creditor upon the ground that public policy requires a real and substantial *delivery* and that possession be taken and retained.

Cases to the same effect might be multiplied, but these we think illustrate the application of the rule and its limitations.

Looking through all the forms under which the parties attempted to disguise the real transaction, it is manifest that the premises in question remained entirely in the possession of the Bankrupt; that he, and he alone, had the physical possession and control of them. The best that can be contended upon the part of the Warehousing Company is, that they had possession of the *premises* concurrently with him, and if their possession of the *premises* upon which the property was located was only concurrent with him, it is difficult to see how their possession of a part of the *property* upon those premises could rise higher.

Concurrent or joint possession does not satisfy the law in this respect; nothing but an exclusive possession satisfies it.

In *Massey vs. Allen*, 84 U. S., 351, this court had before it the question of the validity of a sale of household furniture under a bill of sale as against an assignee in bankruptcy. The parties to the transaction occupied the same house, and continued in the same relation after the sale as before. This court, by Mr. Justice Field, said:

> "The Statute of Frauds of Missouri declares that every sale, by a vendor, of goods and chattels in his possession or under his control, unless accompanied by delivery within a reasonable time, regard being had to the situation of the property, and followed by an actual and continued change of possession, shall be held to be fraudulent and void, as against the creditors of the vendor or subsequent purchasers in good faith. The sale of Downing to Mrs. Massey was, within the terms of the statute, fraudulent and void as against his creditors. It was not accompanied by any delivery of the property, and was not followed by any change of possession. The property consisted of furniture used in a house occupied jointly by himself and his vendee and her husband, and it remained in the same condition, and was used by all three precisely in the same manner after the sale as previously. There was no outward sign manifested, nor *indicia* exhibited, nor notice given, which could apprise the community of any change of ownership. The object of the statute is to prevent parties from being misled by apparent ownership of property where real ownership does not exist, but where a secret transfer has been made to another. This object would be defeated if a sale like the present one could be upheld. In the case of Claflin vs. Rosenburg, 42 Mo., 439, where the vendor had become the clerk of the purchaser, the Supreme Court of Missouri held that the possession which the purchaser was required to take of the property sold, in order to render the sale valid under the statute, must be open, notorious and un-

equivocal, such as would inform the public, or those who were accustomed to deal with the party, that the property had changed hands, and that the title had passed from the vendor to the purchaser; observing at the same time, that possession of this kind excluded the idea of a joint or concurrent possession with the vendor. The statute being a local one, applying only to sales in Missouri, this court will follow the construction given to it by the highest court of the State.

The assignee of Downing's estate was authorized, by the express terms of the 14th section of the Bankrupt Act (14 Stat. at L., 439), to pursue the property thus attempted to be transferred, and, as auxiliary to its recovery, to ask that the sale of the bankrupt be annulled."

It will be observed that in the above case the Statute of Missouri was no more than declaratory of the common law, and the requirement there that the change of possession must be open, notorious and unequivocal, applies equally to the present case.

In *Watson vs. Dealy*, 59 N. Y. Supp., 623, a landlady gave a mortgage on furniture in the house to a boarder, but continued thereafter to conduct the house and use the furniture. *Held* that there was no sufficient transfer of possession.

In *Babb vs. Clemson*, 10 Sergeant & Rawle, 419, where there was a contest as to certain farming property and household furniture as between the holder of a bill of sale and execution creditors, the Supreme Court of Pennsylvania, by Mr. Justice Duncan, said:

"There cannot be a concurrent possession in the assignor and assignee; it must be exclusive, or it is deemed colorable and fraudulent. To defeat the execution, there must have been a *bona fide, substantial change of possession.* It is mere mockery to put in another person to keep possession jointly with the former owner; a concurrent possession with the assignor is colorable."

The facts in this latter case were: Pusey made a bill of sale of the property to his sister-in-law, Elizabeth Clemson. The parties lived together in the same house, and for the most part the property and the use thereof continued the same after as prior to the making of the bill of sale.

Turning again to the opinion of this Court in *Casey vs. Cavaroc,* we call especial attention to the language, that

> "a pledge is not valid if the dispossession of the debtor is not sufficiently complete to *prevent* substitution."

In the present case it is conceded that the Bankrupt remained in such possession; that not only was he not *prevented* from making substitution, but was enabled at his will, at all times, to sell the property covered by the warrants and substitute other property for it, and in fact did so. It is rather alarming to find that so extensive were these substitutions that notwithstanding the difficulties placed in the path of the Trustee and the general creditors, they were able to show that as to at least five of the thirteen warrants held by the Bank, and as to at least three of the five warrants held by Rogers & Brother, the property covered by those warrants had been sold and removed and other property substituted in its place. Out of the eighteen warrants, eight are, by the decree of the Court, made to cover property substituted by the Bankrupt in place of the property originally covered by the warrants, and these substitutions were made, if not by the acquiescence or consent of the Storage Company, at least by its supine negligence.

If the possession were actually in the storage company their rights undoubtedly would not be lost by permitting the

owner from time to time to inspect the goods, or, acting subject to the Storage Company, to do such acts as might be necessary for their care; but it is quite different to turn this clear around so that the dominant possession is in the the owner and the storage company, as here, has a right of access from time to time only by permission of the owner.

We have considered the question of change of possession as though it were to be tested by the rule applicable in cases of sales or pledges, but such rule is too favorable to the Petitioners. In the case of sales, allowance has been made of a reasonable time under the circumstances for the purchaser to remove the property. This is particularly true of *Gibson vs. Stevens,* and is the point of decision in that case. In the case of pledges, regard has been had to the necessity for the care of the property, as in the case cited in *Casey vs. Cavaroc,* where the wine pledged was of such special quality that it was difficult to find any person other that the pledgor to care for it. But reasons of this kind have no application in determining the possession that is sufficient to constitute a *storing* of property in a warehouse, and the issuance of a valid warehouse receipt.

The purpose of a warehouse is to store property—to have and to keep the actual physical possession of the property. Until the warehouseman has that, he is not authorized to issue a receipt, and no other kind of possession is sufficient.

The Warehouse Statute of Illinois from which these receipts must derive their validity, provides:

> "Any warehouseman of any public warehouse who shall be guilty of issuing any warehouse receipt for any

> property not *actually* in *store* at the time of issuing such receipt, or who shall be guilty of issuing any warehouse receipt in any respect fraudulent in its character, either as to its date or the quantity, quality or *inspected* grade of such property * * * shall suffer, in addition to any other penalties prescribed by this Act, imprisonment in the penitentiary for not less than one and not more than ten years."

The character of the possession which the warehouseman must have is prescribed by the statute. The property must be *"actually* in *store"* before the receipt is issued, otherwise the offender shall suffer imprisonment of not less than one nor more than ten years in the penitentiary.

Apply the statute to this case. The property does not come within the class of bulky or ponderous articles. Those are not usually, if at all, stored in buildings, and they are incapable in the ordinary course of commerce, of manual delivery; but in the present case we are dealing with perishable property necessarily stored in a warehouse and readily susceptible of actual and complete delivery. The language of the Act is explicit. It would be difficult to make it more so—the property must be actually in store before the receipt issues. No other possession satisfies the language of the Act. In this case the Storage Company had no warehouse, did not offer to store, was not paid for storage and did not undertake any care or custody of the property. Whatever the rule might be, in other cases, manifestly so far as these receipts are concerned, the Petitioners have not brought them within the protection of the law.

Great stress is placed by counsel upon the necessity of the court sustaining the business of warehousing "presented by the method disclosed in this case," because of modern business requirements. Probably every scheme or business plan presented to this court and condemned by law, has been sought to be sustained by the argument of "the demands

of commerce" or "the requirements of modern business" or the "evolution of trade," and it should not be overlooked that no case is cited where any such "system of warehousing" as is shown in this case, has received the sanction of the courts.

So far as concerns this new system of warehousing which this court is now asked to approve, if this court will, as suggested by Petitioners' counsel, take judicial notice "that sundry like companies are engaged in the same kind of warehousing," we think it will also take notice of the fact that, not only are there the two cases pending in this court involving the validity of such warehouse receipts, but there are two other cases pending in the Circuit Court of Appeals for the Seventh Circuit, and also a case pending in the Eastern District of Tennessee, all involving like questions, all of them arising in bankruptcy cases, and in all of them the attempt being made to sweep away from the general creditors practically the entire estate by means of such receipts.

An apt illustration of what these companies seek to do, might be found in the case in Tennessee not yet reported referred to in the Petitioners' brief. In that case a car manufacturing company, having four large plants, made a lease of each of them to the warehouse company, thereafter continuing its business of manufacturing cars and car parts in the same manner as before. The only possession taken by the Storage Company was by tying tags upon piles of material and appointing a clerk of the Car Company at each plant as the custodian of the warehouse company at a salary of $2.50 per month. Bankruptcy resulted. It was found that practically none of the materials could be identified with the receipts, that the materials were constantly being used up and changing in the process of manufacture, and that the only attempt on the part of the Storage Company had been to keep the aggregate amount of materials of the various kinds at the plants, irrespective of location, equal to

the total amount of each kind for which warrants were outstanding. In other words, the entire plant in active operation became a warehouse, and the materials while passing through it were claimed to be validly covered by the outstanding receipts. These facts are of course not now before this court, and we mention them only by way of illustration and in reply to the suggestion of the Petitioners' counsel to which we have referred.

Our objection is not the fact that the warehousing company does not *own* its warehouse. It is that the companies engaging in this business do not pretend to *store* property, nor to take the custody, care or control of it. All that they do is *to issue warehouse receipts to assist the owner in borrowing money.* The business as conducted is not warehousing at all, but in fact the manufacture of collaterals. We have not yet reached that evolutionary—or in truth revolutionary—stage, where business conducted in the manner and under the circumstances disclosed here, has received the sanction of the courts.

What we do insist upon is, that the place where the property is located must be an *actual warehouse,* the property must be *stored* therein so as to be subject exclusively to the dominion and control of the warehouseman, and it must be beyond the power of the owner of the property to deal with it as his own. In the present case, if they had leased one or two of the floors of Rodgers' warehouse, separated in a substantial manner from the other floors, by doors, and the keys to the floors so rented, retained and kept by the Storage Company, so as to place it beyond Rodgers' powers to deal with the property as his own, no question as to the validity of the receipts would be raised. But this kind of warehousing is not intended for any such purpose. Its only object is to issue receipts upon the property, and the property must remain so located that the owner may conveniently use, or sell and dispose of it, the theory being that he will replace

it with an equal amount of like quality and value. For the risk in this respect—and for that only—the Storage Company is paid.

IV.

THE WAREHOUSE RECEIPTS BEING INVALID, AND NEITHER THE STORAGE COMPANY NOR THE BANK BEING IN ACTUAL POSSESSION OF THE PROPERTY, THERE WAS NO VALID PLEDGE.

In order to maintain a pledge, possession is essential. Neither of the Petitioners have any possession of the property claimed, except by virtue of the alleged warehouse receipts. If those receipts are valid, the endorsement of them transferred the title to the property covered by them, and carried with it constructive possession of the property. But if the receipts are invalid, then the case stands as though they did not exist. In other words, if the receipts are insufficient to pass title, then neither of the Petitioners have any possession of the property, and therefore have no valid pledge.

V.

UNDER THE BANKRUPTCY ACT THE PETITIONERS HAVE AS AGAINST THE TRUSTEE NO CLAIM TO, OR LIEN UPON, THE PROPERTY PURPORTING TO BE COVERED BY THE WAREHOUSE RECEIPTS.

The applicable provisions of the Bankruptcy Act are to be found in Sections 67 and 70.

Section 67 provides:

> "a. Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.
>
> "b. Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate."

Clauses c, e and f, of Section 67, relate to preferences.

Section 70 provides:

> "a. The trustee of the estate of a bankrupt, upon his appointment and qualification, * * * shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all * * * (4) property transfered by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transfered or which *might* have been *levied upon and sold under judicial process* against him."

The Petitioners' position upon this point is that they are entitled to an equitable lien upon the property purporting to be covered by these warehouse receipts, which is superior to the rights of the trustee in bankruptcy.

The proposition on their part admits these facts:

(1) That the warehouse warrants are invalid, and their endorsement transferred no title whatsoever to the Petitioners.

(2) That neither the Storage Company nor the Petitioners had possession of the property covered by the receipts, and that the possession, control and disposition of the property covered by these receipts remained in the Bankrupt, with full power on his part to sell and dispose of the same and to substitute other property for it, and that in fact he did so sell and dispose of at least a large part of the property and substitute other property in lieu thereof.

It is conceded by the Petitioners' counsel, in the discussion of this question, that prior to the institution of the bankruptcy proceedings the property could have been levied upon and sold under judicial process against the Bankrupt or subjected to the claims of creditors by a creditors' bill; and this is clearly the law of Illinois:

Porter vs. Dement, 35 Ill., 478;
Cooper vs. Ray, 47 Ill., 53;
Atkinson vs. Foster, 134 Ill., 472.

Union Trust Company vs. Trumbull is relied upon as supporting the proposition that the Petitioners are entitled to an equitable lien, but in that case the lien was sustained solely upon the ground that the voluntary assignee for the creditors stood in the shoes of the debtor, and as against him the party loaning money in good faith had a superior equity.

The question then is, is the trustee in bankruptcy subject to the same disabilities as a voluntary assignee for creditors?

This question would seem to be answered in the most explicit manner by the sections we have quoted.

Section 67a provides that claims which for want of record "or for other reasons" would not have been valid as against "the claims of the creditors" shall not be liens against the estate.

Section 67b, which is not referred to in Petitioners' brief, is in this emphatic and significant language:

> "Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate."

Turning to Section 1 of the Act we find the word "creditor" is defined thus:

> "'Creditor' shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney or proxy."

So that independently of Section 70 it would be difficult to find language more precisely and explicitly conferring upon the Trustee the rights of creditors,—all creditors, judgment or otherwise,—than Congress has placed in 67b.

But this position is further emphasized in Section 70, where the Trustee is, by Clause 5, vested with title to property which, at the date of the filing of the petition, "might have been levied upon and sold under judicial process against" the bankrupt.

It is conceded that under the laws of Illinois, on May 7, 1901, the creditors of this Bankrupt could have levied upon and sold this property. How, then, in view of the provisions we have quoted, can it be said that the Bankruptcy Act evinces an intention to deprive the creditors of this right?

It is significant that the language most relied upon by Petitioners' counsel with reference to *bona fide* purchasers and *bona fide* transactions, does not occur in connection with the provisions which we have quoted. Those words are to be found in other parts of the Act, and with reference to other provisions.

The point we make now is that by the language of 67-a and 67-b, and Clause 5 of Section 70, the Trustee is explicitly invested with the rights which creditors would have had if the Bankruptcy Act had not intervened. The purpose of this provision cannot be better stated than it is put by Judge Jenkins in his opinion in this case, thus:

> "We are satisfied, from a careful scrutiny of the act, that the filing of the petition is something more than the dedication by the bankrupt of his property to the payment of his debts; that the trustee is not only invested with the title of the property, but, *since, after the filing of the petition the creditors are powerless to pursue and enforce their rights,* the trustee is vested with their rights of action with respect to all property of the bankrupt transferred by him or encumbered by him in fraud of his creditors, and may assail, in behalf of the creditors, all such transfers and encumbrances to the same extent that creditors could have done had no petition been filed."

In *Miller vs. Nugent,* 184 U. S., 1, this court by Mr. Chief Justice Fuller, said:

> "It is as true of the present law, as it was of that of 1867, that the filing of the petition is a *caveat* to all the world, and in effect an *attachment* and injunction."

In *Casey vs. Cavaroc,* 96 U. S., 467, already referred to, Mr. Justice Bradley says:

> "Indeed it may be laid down as a general rule, as well at the common law as the civil law, that a trustee, assignee or syndic, having the powers and occupying the relations which are sustained by a receiver under the National Banking Act, or an assignee in bankruptcy, may well oppose any privilege or preference which the law itself, unaided by a *bona fide* purchase or judgment, would regard as void against the general creditors in a direct contest between them and the parties claiming such privilege or preference; even though the debtor

himself, on account of some personal disability arising from his own acts or engagements, could not resist the claim. That an assignee in bankruptcy has this power can not well be doubted; and since a national bank can not be put into bankruptcy, but can only be wound up under the peculiar provisions of the Banking Act, the receiver appointed by virtue thereof must have the same power; or the absurd consequence would follow, that the property of a bank disposed of by voluntary conveyances, or pledges not good as to third persons, would be beyond the reach of creditors.

"Where the legal or equitable property in a security passes, and there is no express law invalidating the transfer the creditor will be entitled to hold it as well against the assignee or receiver as against the debtor; because the assignee only takes such title as the debtor has at the time of the assignment or insolvency. In that case, however, the question of fraud would be admissible as a question of fact, to invalidate the transaction. But, in the present case, that question does not arise, or if it might be raised it is immaterial. The Credit Mobilier claims a privilege by virtue of a pledge: and such a privilege, as we have seen, can not be maintained as to third persons, without possession. Bad faith, it is true, would defeat the pledge though the creditor had possession. But want of possession is equally fatal, though the parties may have acted in good faith. Both are necessary to constitute a good pledge so as to raise a privilege against third persons. The requirement of possession is an inexorable rule of law, adopted to prevent fraud and deception; for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods."

Mr. Justice Bradley then proceeds to show that such a creditor has no equity over the general creditors entitling him to a claim of this kind, thus:

"This consideration meets the objection which is urged against the rule, that it would result in giving to

the general creditors the benefit of the advances made to the debtor on the faith of the stipulated pledge, inasmuch as the estate is increased to the extent of these advances. It is true that the estate is so increased; but the debts and liabilities are also increased to the same amount by the demand of the party who makes the advances, the only effect of the rule being, that the latter comes into concurrence with the other creditors on an equality, and not by way of preference; and if the latter derive any benefit from this result, it must be remembered that, in the view of the law, they might not have given credit to the common debtor had he not remained in possession of the goods, and appeared to continue as the absolute owner thereof. If the pledge should be sustained, they would have good cause to complain that they had been deceived by the acts of the parties setting up the pledge. So that, on the question of relative merit and demerit, the parties are in all respects equal. It is on this principle that the law is founded.

"These considerations also supply an answer to another suggestion, that equity will consider as done what the parties intended should be done, which it is assumed was, in this case, a transfer of the title of the securities. Equity will not exercise this power when it would injure third persons who have incurred detriment, and acquired consequent rights by the acts that are done. Such detriment has, in view of the law, been incurred in this case, and such rights have, by the express letter of the law, accrued."

In re Leigh, 96 Fed. 806, it is held that a chattel mortgage invalid for want of record, is void as against the Trustee in bankruptcy.

In re Howland, 109 Fed. 869, a contract for a conditional sale was invalid as to creditors and that the property passed to the Trustee, Judge Coxe, saying:

"The merchandise in question therefore passed to the Trustee pursuant to the provisions of Bankruptcy Act, sec. 70 (5) as the property 'which might have been

> levied upon and sold under judicial process against the bankrupt.' Neither this section nor section 67a, which is also in point, is found in the Act of 1867."

In re Garcewich, 115 Fed. 87, the Circuit Court of Appeals for the Second Circuit, held that where a conditional sale was void because it permitted the bankrupt to use or sell the property, the Trustee was entitled to hold the property as against the vendor.

In re Tweed, 131 Fed. 355, a conditional sale void against creditors for want of record and acknowledgment,—*Held*, that the Trustee took title to the property.

In re Butterwich, 131 Fed. 371, a case of an attempted conditional sale, Judge Archibald says:

> "By section 70 of the Bankruptcy Act, the Trustee is vested by operation of law with the title of the bankrupt as of the date when he was adjudged a bankrupt to all '(5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him.' That is to say, the Trustee does not stand simply in the shoes of the bankrupt, but is invested with the rights of his execution creditors and the question in the present instance therefore, is whether the show-cases which are sought to be reclaimed could have been successfully subjected while in the hands of the bankrupt to levy and sale upon execution against him. This is to be determined by the local law with regard to which as applied to this case there can be no doubt".

In re Mullen, 101 Fed. 413, was a petition by the Trustee seeking to recover real estate in the possession of a vendee of the vendee of the bankrupt, and in discussion the construction of the Act, Judge Lowell says:

> "I am inclined to think that section 70e was intended to provide simply that the trustee in bankruptcy should

have the same right to avoid conveyances as was possessed by creditors, and this with especial reference to the statute of 13 Eliz. and similar statutes of the several states. Section 70e was not intended to define what conveyances creditors of the bankrupt might avoid, or to distinguish, in the respect of such conveyances, between the rights of the creditors taken together and the rights of a trustee in bankruptcy, but only to give to the trustee such rights as the creditors, or any of them, possessed. In Low. Bankr., p. 513, it is said to add nothing to the comomn law. The Statute of 13 Eliz. makes void, as against creditors, conveyances in fraud of creditors, but provides that the operation of the statute shall not extend to any estate conveyed upon good consideration and bona fide. In inserting a like exception in section 70e, I think congress meant substantially to re-enact the exception placed in the Statute of Elizabeth, and not to give to bona fide purchasers for value greater or less rights than those which that statute gives them. The reference to bona fide purchasers in section 70e should therefore receive the same construction that a like reference has received in the statute of 13 Eliz. and its American substitutes."

In re New York Economical Printing Company, 110 Fed. 514, and *in re Kellogg*, 118 Fed. 1017, which latter case came to this Court as *Hewitt vs. Berlin Machine Works*, 194 U. S. 296 are clearly distinguished in the opinion of this Court. In the *Berlin* case the machines were sold under a conditional contract valid under the laws of the State of New York, save only as against subsequent purchasers, pledgees or mortgagees in good faith; that is they were valid and binding as against all creditors. For this reason the Court held that the trustee's title was not superior to the title of the vendor, and in delivering the opinion of the Court in this case Mr. Chief Justice Fuller quotes from *re Economical Printing Company*, thus:

"The present act like all preceding bankruptcy acts contemplates that a lien good at that time (the date of

the petition) as against the debtor *and as against all of his creditors, shall remain undisturbed.* If it is one which has been obtained in contravention of some provision of the act, which is fraudulent as to creditors, or invalid as to creditors for want of record, it is invalid as to the Trustee."

The opinion then proceeds thus:

"We concur in this view which is sustained by decisions under previous bankruptcy laws (citing cases), and is not shaken by a different result in cases arising in states by whose laws conditional sales are void as against creditors. In our opinion, these machines were not, prior to the filing of the petition, property which under the law of New York, might have been levied upon and sold under judicial process against the bankrupt; nor could she have transferred it within the intent and meaning of section 70a."

In re Tweed, 131 Fed. 355, and *in re Butterwick,* 131 Fed., 371, both follow and apply this construction of the Bankruptcy Act.

The two clauses so much relied upon by Petitioners' counsel in this connection, are 67-e and 70-e.

Clause 67-e relates entirely to preferences, that is, transfers or encumbrances within four months prior to the filing of the petition, while Clause 70-e is the general authority to the trustee to avoid any "*transfer* by the bankrupt of his property which any creditor might have avoided", and to recover such property save as to "a *bona fide* holder for value." It should be observed, that the words "*bona fide* holder for value" are not used in connection with the powers of the trustee to which we have already referred.

These provisions afford no protection to the present Petitioners for these reasons:

(1) The Petitioners under the proposition we are now discussing, do not claim under any *transfer,* but are asserting only an equitable lien. It is not a proceeding by the Trustee to avoid a *transfer,* but the creditor is the moving party and asserts a claim to an *equitable lien* against the assets in the hands of a Trustee.

The warehouse receipts were invalid, the endorsement thereof did not transfer the *property* in the seed, and the Petitioners having no *possession* of the property, they do not come within the provisions of the Act.

The construction of these clauses is fully discussed by Judge Lowell, in the case *In re Mullen,* 101 Fed., 413.

(2) The meaning of the term *"bona fide* purchasers for value" is well settled, and the doctrine does not protect the holder of a mere equity. It applies to and protects only the purchaser of a legal estate or title. It has no application therefore, in favor of a party who has neither title nor possession and claims only an equitable lien.

Hallet vs. Collins, 10 Howard, 174.
Vattier vs. Hinde, 7 Peters, 271.

(3) The protection given by the Bankruptcy Act to *bona fide* holders, or purchasers, for value, is no greater than that already given to such holders or purchasers by the courts in construing the Statute of 13 Elizabeth and the American Statutes re-enacting that Act or founded thereon; and such protection does not extend to transactions invalid as against creditors.

In re Mullen, 101 Fed., 413.

The policy of the Bankruptcy Act, as it seems to us, also strongly supports our position. It is the policy of that Act to produce equality of distribution; and for this purpose the bankruptcy proceeding is in effect an attachment of the property and an injunction against the creditors from taking

further proceedings for the assertion of their rights. Therefore, the parties being restrained by the bankruptcy proceedings from the assertion of their rights, full authority is vested in the Trustee to assert the rights which, by reason of the proceedings, the creditors are prevented from enforcing, so that an equal and proper distribution of the assets of the estate can be made. To hold that the Act does not confer upon the Trustee this power, would prevent the accomplishment of one of its most essential objects.

Again, to sustain this claim of an equitable lien, the burden was on the petitioners to show that the specific property purporting to be covered by the receipts held by them, was in the possession of the Trustee. Not only did they not do this, but the record shows that at least as to eight of the eighteen receipts the property now in the possession of the Trustee was substituted by the bankrupt in place of that originally covered by the receipt. That this is fatal as against the existence of such lien, is shown in the brief heretofore filed.

We submit that the decree of the Circuit Court of Appeals should be affirmed.

JAMES H. REED,
JAMES H. BEAL,
Of Counsel for Respondents, the Chicago Title & Trust Company, Trustee, and James A. Patten.

JOSEPH E. PADEN,
NEWTON WYETH,
REED, SMITH, SHAW & BEAL,
Of Counsel.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1904.

No. 139.

THE FIRST NATIONAL BANK OF CHICAGO, H. W. ROGERS and JAMES C. ROGERS, as H. W. ROGERS & BROTHER, *Petitioners,*

vs.

THE CHICAGO TITLE & TRUST COMPANY, Trustee of ALEXANDER RODGERS, Bankrupt, THE NATIONAL STORAGE COMPANY, JAMES A. PATTEN, FRANK E. WINANS, and E. W. BAILEY & COMPANY, *Respondents.*

CERTIORARI.

To Messrs. Henry S. Robbins, Wallace Heckman and James G. Elsdon, Counsel for Petitioners:

PLEASE TAKE NOTICE, that on this 11th day of February, 1905, these respondents forwarded to the clerk of the Supreme Court the following citation,

with request to file or bring the same to the attention of the court, as may be done.

Respectfully,

JOSEPH E. PADEN and
NEWTON WYETH,
Counsel for Respondents, the Chicago Title & Trust Company, Trustee, and James A. Patten.

I hereby certify that I caused copies of the foregoing notice and the following citation to be delivered to the said counsel for petitioners, this 11th day of February, 1905. NEWTON WYETH.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1904.

No. 139.

THE FIRST NATIONAL BANK OF CHICAGO, H. W. ROGERS and JAMES C. ROGERS, as H. W. ROGERS & BROTHER, *Petitioners,*

vs.

THE CHICAGO TITLE & TRUST COMPANY, Trustee of ALEXANDER RODGERS, bankrupt, THE NATIONAL STORAGE COMPANY, JAMES A. PATTEN, FRANK E. WINANS, and E. W. BAILEY & COMPANY, *Respondents.*

CERTIORARI.

Counsel for respondents, The Chicago Title & Trust Company, trustee, and James A. Patten, beg to cite to the court in this cause the following case from the Eighth Circuit:

Dodge v. *Norlin*, 133 Fed. Rep., 363 ("Advance Sheets," Feb. 2, 1905).

Respectfully submitted.

JOSEPH E. PADEN, and
NEWTON WYETH,
Counsel for Respondents, Chicago Title & Trust Company, Trustee, and James A. Patten.

Supreme Court of the United States.

No. 139.—October Term, 1904.

The First National Bank of Chicago, H. W. Rogers and James C. Rogers, as H. W. Rogers & Brother, Petitioners,
vs.
The Chicago Title & Trust Company, Trustee of Alexander Rodgers, Bankrupt; The National Storage Company, James A. Patten, Frank E. Winans, and E. W. Bailey & Company.

On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[May 15, 1905.]

The petition for certiorari represented:

"1. That for some years prior to the 10th day of May, 1901, Alexander Rodgers was a wholesale dealer in seeds in the city of Chicago, Illinois, and that on said day he was adjudged a bankrupt by the District Court of the United States for the Northern District of Illinois, and the Chicago Title and Trust Company, respondent herein, was duly appointed receiver, and subsequently trustee, of the estate of said bankrupt.

"2. That the National Storage Company, respondent, is a corporation organized under the laws of Illinois to do, and is engaged in doing, a warehousing business in the State of Illinois and elsewhere. That some months prior to said 10th day of May, said storage company issued to said Alexander Rodgers sundry warehouse receipts which were similar except as to the quantities and dates; one of which said receipts is in the words and figures following:

'Warrant No. 8401. Lot No. 1.

'The National Storage Company, office 217 First National Bank Building, Chicago, hereby acknowledges to have received two hundred and fifty (250) bags timothy seed, said to weigh 31,751 pounds, contained in div. B. sec. 1, fifth floor, at its warehouse premises No. 281, located at 220–230 Johnson street, Chicago, Illinois, and will surrender the same to the order hereon of Alexander Rodgers upon payment of charges and delivery of this warrant, at its office in Chicago, duly endorsed.

'It is agreed that this company is not responsible for loss or damage to property occasioned by fire, water, leakage, vermin, ratage, shrinkage, accidental or providential causes, riot or insurrection, frost or change of weather, or from being perishable while in storage, and that this company shall, in the custody of the above property, be the agent of the holder of this warrant.

'Storage and charges as per contract on file with this company.

'Chicago, Aug. 31, 1900.'

[Signed by the National Storage Company by its president and treasurer, and the corporate seal affixed.]

"That immediately thereafter said Rodgers endorsed and hypothecated thirteen of said receipts to your petitioner, the First National Bank of Chicago, to secure loans made by it to him aggregating about $12,000, and endorsed and hypothecated five of said receipts to your petitioner, H. W. Rogers & Brother, to secure a loan by them to him of $5,000, and that said loans are still unpaid and due to petitioners respectively, and said petitioners, at the time said Rodgers was adjudged a bankrupt, held and still hold said warehouse receipts as security for said loans respectively.

"3. That on the 13th day of May, 1901, said Chicago Title and Trust Company, as said receiver, filed in said District Court a petition reciting that it had taken possession of the seed mentioned in said warehouse receipts, and asking the court's directions in respect to a sale thereof. That to said petition each of these petitioners filed a special appearance, specially objecting to the jurisdiction of said District Court over said seed, and such petitioner, as did also said National Storage Company. That thereupon the court referred said petition to a referee to take proof and report his conclusions; that the referee took proof and reported that the seed covered by said warehouse receipts was, at the time of the adjudication in bankruptcy, in the possession of said storage company, that the District Court was without jurisdiction, and recommending a dismissal of said petition.

"That subsequently exceptions to said report were heard by said District Court, and it confirmed the referee's finding as to possession, but overruled his finding as to jurisdiction, and held it had jurisdiction, and ordered (the petitioner, First National Bank, consenting) that said seed be sold and the proceeds thereof be deposited with said First National Bank, subject to the further order of said court; that said seed was sold, and the amount realized therefrom was in excess of the amounts of petitioners' said claims, and this money is still in the hands of the petitioner, the First National Bank.

"That said petitioners thereupon severally filed petitions in said court, asking payment of their said claims out of said proceeds. That said Chicago Title and Trust Company, as trustee, and the respondents, James A. Patten, and E. W. Bailey & Company as creditors, answered said petitions, denying the right of your petitioners to said fund; and thereupon said petitions were referred to said referee to take additional proof and report the same to the court, and the said matter again coming before the court upon the report of said referee and exceptions thereto, said petitions of your petitioners were consolidated, and the court confirmed said report of said referee, except so far as it found a lack of jurisdiction in said District Court, and adjudged that said District Court had jurisdiction; that said decree also found that said storage company was, at the time of the filing of the bankruptcy petition herein, in the possession of, and entitled to the possession of, said seed, and decreed that petitioner, First National Bank, retain out of said proceeds the sum of $9,854.15 on account of its claim, and pay therefrom to petitioners, H. W. Rogers & Brother, $5,000.

"That thereupon said Chicago Title and Trust Company, as trustee, and said James A. Patten severally perfected appeals from said order or decree to the Circuit Court of Appeals of the Seventh Circuit.

"That thereafter said two appeals were duly filed in said Circuit Court of Appeals, and were there, by order of court, consolidated and heard as one case.

"That said Circuit Court of Appeals thereafter filed its opinion in said consolidated causes reviewing the question of fact whether the storage company was in possession of said seed at the time of the proceedings in bankruptcy, and held that said District Court had erred in deciding this question of fact, and overruled said District Court upon said question of fact, and decided that said storage company was not in possession of said seed, and remanded said cause with directions to enter a decree for said trustee.

"That thereafter these petitioners filed a petition for rehearing in said cause, which was subsequently denied.

"That your petitioners are advised by counsel that there existed in law no right of appeal by said trustee or said Patten from said order of said District Court, and that, if said alleged attempts to appeal should be treated strictly as appeals, said Circuit Court of Appeals was without jurisdiction of the subject-matter, and its said order reversing said decree of the District Court was null and void.

"That your petitioners are also advised by counsel that, if said appeals rightly could be, and were, treated by said Circuit Court of Appeals as in effect petitions for revision, said Circuit Court of Appeals, by the express terms of the bankruptcy statute, was limited in its jurisdiction to a revision of the decision of the District Court in matter of law, and that said Circuit Court of Appeals, in reversing said District Court upon the said question of fact, proceeded without jurisdiction, and in violation of the said statute." . . .

The granting of the writ was objected to, and it was stated that Alexander Rodgers, the bankrupt, filed his petition in bankruptcy May 8, 1901; that the Chicago Title and Trust Company was appointed receiver the same day; and that the bankrupt turned over his property, including the seed in dispute, to the receiver. And it was insisted that the proceeding was a plenary suit, to the institution of which, in the District Court sitting in bankruptcy, the petitioners as adverse parties, had consented. Certiorari was granted, and thereafter a motion to quash the writ was filed on the ground that the matters involved and determined in the cause were controversies arising in bankruptcy proceedings as distinguished from proceedings in bankruptcy, and that the remedy was by error or appeal rather than by certiorari. Consideration of this motion was postponed to the hearing on the merits.

The case in the Circuit Court of Appeals is reported 125 Fed. Rep. 169.

Mr. Chief Justice FULLER delivered the opinion of the Court:

In the view we take of the case, the petition for certiorari sufficiently discloses the facts. If the proceeding in the District Court was a proceeding in bankruptcy and not an independent suit, no appeal lay to the Circuit Court of Appeals, and the jurisdiction of that court was confined to revision in matter of law "on due notice and petition" under clause *b* of section 24.

The distinction between steps in bankruptcy proceedings proper and controversies arising out of the settlement of the estates of bankrupts is recognized in sections 23, 24 and 25 of the present act, and the provisions as to revision in matter of law and appeals were framed and must be construed in view of that distinction. *Holden* v. *Stratton*, 191 U. S. 115; *Denver First National Bank* v. *Klug*, 186 U. S. 202; *Elliott* v. *Toeppner*, 187 U. S. 327, 333, 334.

This distinction existed under the prior bankruptcy law, and the then decisions in respect of a proceeding in bankruptcy and an independent suit are applicable. It was settled that the bankruptcy court was without jurisdiction to determine adverse claims to property, not in the possession of the assignee in bankruptcy, by summary proceedings, whether absolute title or only a lien was asserted. *Smith* v. *Mason*, 14 Wall. 419; *Marshall* v. *Knox*, 16 Wall. 551; *In re Bonesteel*, 7 Blatch. 175, Mr. Justice Nelson; *Knight* v. *Cheney*, 14 Fed. Cases 760, Mr. Justice Clifford; *In re Ballou*, 4 Ben. 135, Mr. Justice Blatchford, then District Judge; *In re Marter*, 16 Fed. Cases 857, Mr. Justice Brown, then District Judge.

The present act was plainly framed in recognition of the principle of these cases. Subdivision 7 of section 2 confers jurisdiction on the District Courts as courts of bankruptcy to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;" and we held in *Bardes* v. *Bank*, 178 U. S. 524, that this exception referred to clause *b* of section 23 of the act, which provides: "Suits by a trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant." And that the District Courts had no jurisdiction of such plenary suits without consent.

Petitioners asserted this express statutory limitation on jurisdiction and objected that the District Court could not proceed, but their objections were overruled. That they then did not abandon their claims did not amount to a waiver of their objections or to a consent to an exercise of jurisdiction against which they protested. *Louisville Trust Company* v. *Cominger*, 184 U. S. 18. In that case, to a rule entered in the bankruptcy court, requiring an adverse claimant in possession of a fund to pay it to the trustee in bankruptcy, the claimant tendered a formal response, denying jurisdiction, which the court refused to entertain, and he then participated in a hearing upon the merits. The bankruptcy court sustained its jurisdiction upon the ground that, by his "acquiescence in that mode of procedure," he had assented to its jurisdiction. Upon petition for review the Circuit Court of Appeals reversed the bankruptcy court, and this court upon certiorari affirmed the Circuit Court of Appeals. We said:

"This brought the controversy within the ruling in *Bardes* v. *Bank*, 178 U. S. 524, and the questions attempted to be litigated before the referee and in the District Court as to the allowance of the two amounts could only be raised in the District Court by consent, and then only by plenary suit. If the jurisdiction of the District Court was not consented to, then the State court, under the circumstances of this case, was the proper forum, and the matters in dispute were to be disposed of there. . . .

"The proceeding was purely summary. . . .

"The question is whether the District Court had jurisdiction to finally adjudicate the merits in this proceeding. . . .

"In many cases jurisdiction may depend on the ascertainment of facts involving the merits, and in that sense the court exercises jurisdiction in disposing of the preliminary inquiry, although the result may be that it finds that it cannot go farther. And where in a case like that before us, the court erroneously retains jurisdiction to adjudicate the merits, its action can be corrected on review.

"We are of opinion that even if Comingor could have consented to be pursued in this manner, he did not so consent. He was ruled to show cause, and the cause he showed defeated jurisdiction over the subject matter, that is jurisdiction to proceed summarily. He did not come in voluntarily, but in obedience to peremptory orders, and although he participated in the proceedings before the referee, he had pleaded his claims in the outset, and he made his formal protest to the exercise of jurisdiction before the final order was entered."

And since, as elaborately expounded in *Bardes* v. *Bank*, the District Court had no jurisdiction of an independent suit, it follows that the proceeding in that court could not be held to have been such, as, indeed, in form, on reason, and on authority, it manifestly was not. But, nevertheless, the District Court had jurisdiction to determine whether it could or could not proceed further. *Louisville Trust Company* v. *Comingor*, 184 U. S. 18; *Mueller* v. *Nugent*, Id. 1; *Schweer* v. *Brown*, 195 U. S. 171.

In the present case, the receiver filed a petition reciting that he had taken possession of the property. This was denied. The District Court adjudged that the receiver had not at the time of filing its petition the right of possession, and that the National Storage Company, at that date, and also at the time of the filing of the petition in bankruptcy, was entitled to possession and had possession. Nevertheless it retained jurisdiction and decreed payment to petitioners out of the proceeds of the sale.

The sale in the circumstances did not change the situation. The proceeds stood in place of the property and the order returning the proceeds was equivalent to an order returning the property. This it was proper to do, whether the court had held that it lacked jurisdiction, or ruled in favor of petitioners on the merits. The Court of Appeals sustained the jurisdiction of the District Court upon the ground that it had acquired a fund and had jurisdiction to dispose of it, but we do not think that a court of bankruptcy can create a jurisdiction forbidden by statute. And in any view, the proceeding was a proceeding in bankruptcy. Being such, an

appeal from the decree of the District Court under section 25*a* did not lie, and parties aggrieved could only invoke the supervisory power under section 24*b*. *Holden* v. *Stratton*, 191 U. S. 115; *Hutchinson* v. *Otis*, 190 U. S. 552.

But this was an appeal and not a petition for revision, and hence it was that the Circuit Court of Appeals reviewed the questions of fact and declined to accept the findings of the referee and the District Court. In the exercise of supervisory power, it would have been confined to matter of law. We are clear that an appeal would not lie, and the decrees of the Circuit Court of Appeals must be reversed, with a direction to dismiss the appeals and remand the cause to the District Court for further proceedings in conformity with this opinion.

In our view the District Court should have declined upon its findings to retain jurisdiction, and in that event the decrees for the return of the money should have been without prejudice to the right of respondents to litigate in a proper court, which modification we direct to be made.

Ordered accordingly.

True copy.

Test:

Clerk Supreme Court, U. S.